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v. 2993 No. 14695

United States
Court of Appeals
for the Ninth Circuit

See vol. 2994
MID-STATES INSURANCE COMPANY, a corporation, and THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
Appellants,

vs.

AMERICAN FIDELITY AND CASUALTY COMPANY, INC., a corporation, AMERICAN PLAN CORPORATION, a corporation, MARK HART, JOSEPH LOTZ, RALPH L. SMEAD and L. SUDEKUM,

Appellees.

Transcript of Record

In Three Volumes

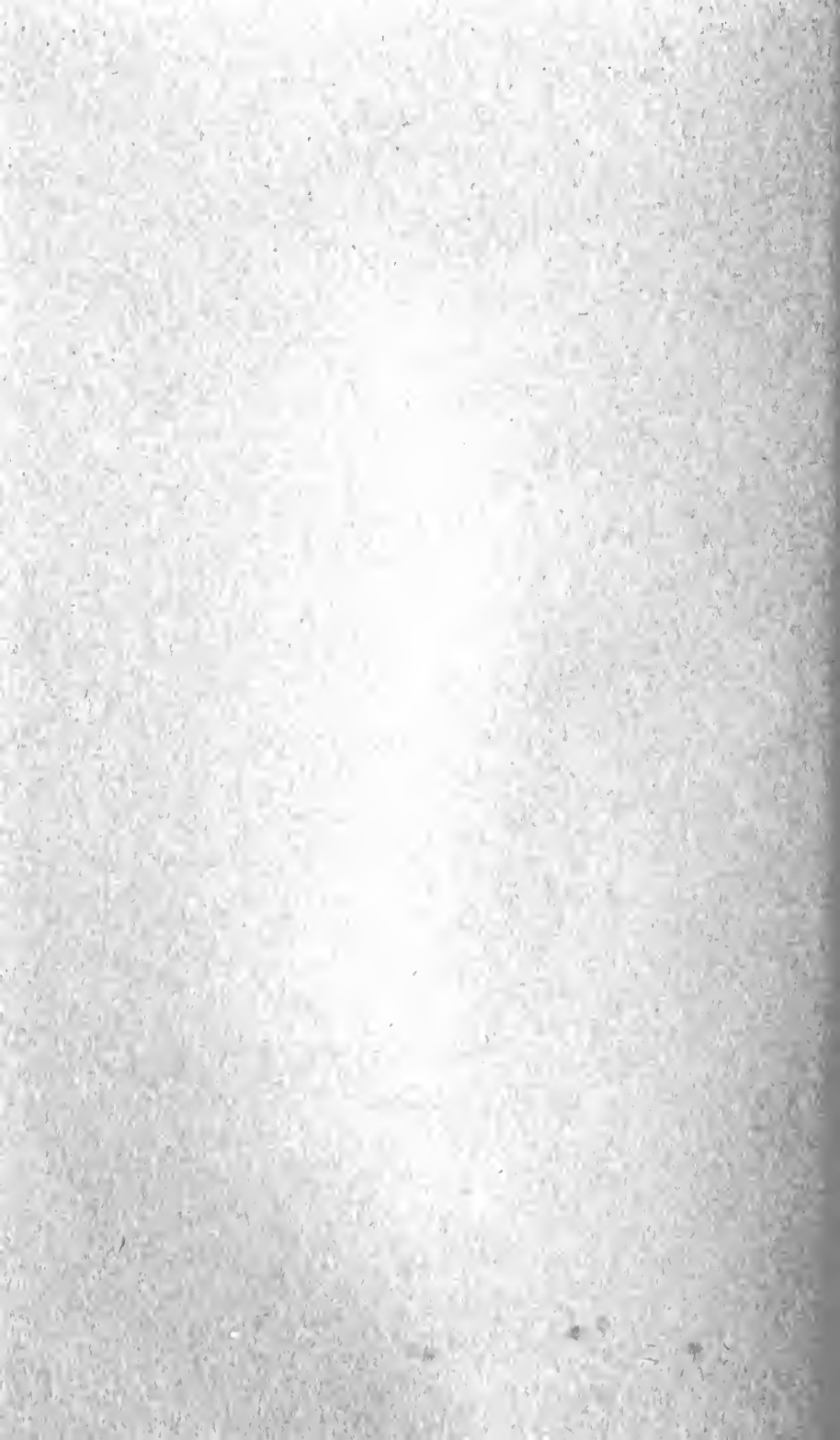
VOLUME I.

(Pages 1 to 400, inclusive.)

Appeal from the United States District Court for the Northern District of California, Southern Division

FILED

JUL 20 1955



No. 14695

United States
Court of Appeals
for the Ninth Circuit

MID-STATES INSURANCE COMPANY, a corporation, and THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
Appellants,

vs.

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In the District Court of the United States, Northern District of California, Southern Division

No. 31311

MID-STATES INSURANCE COMPANY, a corporation,
Plaintiff,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a national banking association,
Defendant.

COMPLAINT

Comes now plaintiff and for cause of action against defendant above named alleges as follows:

I.

Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Illinois. Defendant, The Anglo California National Bank of San Francisco is a national banking association organized and existing under and by virtue of the laws of the United States of America, and authorized to transact and transacting a general banking business in the State of California, with its principal place of business in the City and County of San Francisco, State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

II.

At the times hereinafter set forth, Public Service

Insurance Co., a corporation, drew and executed certain of its checks, which said checks are hereinafter more particularly described, upon Pacific National Bank of San Francisco to the order of plaintiff. On or about the date on which each of said checks was drawn and executed, each of said checks was delivered by said Public Service Insurance Co. to one Joe Lotz; said Joe Lotz had authority to receive, but no authority to endorse said checks, or any of them, or any check for plaintiff. Thereafter said Joe Lotz endorsed each of said checks in the manner set forth on the back thereof and presented each of said checks to defendant and defendant paid the amount thereof upon said unauthorized endorsement: defendant did thereafter collect the amount of each of said checks in return for the delivery thereof to the said Pacific National Bank of San Francisco and has ever since retained and does still withhold from plaintiff the amount of each of said checks. The number, date of drawing and execution, and the amount of each of said checks is as follows:

No. 3590, Sept. 7, 1951, \$5,547.25; No. 3611, Sept. 14, 1951, \$67,500.00; No. 3628, Sept. 24, 1951, \$11,250.00; No. 3660, Sept. 28, 1951, \$3,750.00; No. 3699, Oct. 15, 1951, \$6,089.44.

A true copy of each of said checks is annexed hereto and marked Exhibits A, B, C, D and E, respectively, and said copies are by this reference made a part hereof.

III.

On November 16, 1951, George R. Fulmore-

Trustee drew and executed his check No. 980 upon Bank of America, National Trust and Savings Association, Fulton-Merced Branch, Fresno, California, for the payment of the sum of \$1,484.65 to the order of plaintiff; a copy of said check is attached hereto marked "Exhibit F" and by this reference is made a part hereof. On or about November 16, 1951, said check was delivered by said George R. Fulmore-Trustee to one Joe Lotz; said Joe Lotz had authority to receive, but no authority to endorse said check, or any check for plaintiff. Thereafter said Joe Lotz endorsed said check in the manner set forth on the back thereof and presented said check to defendant and defendant paid the amount thereof upon said unauthorized endorsement; defendant did thereafter collect the amount of said check in return for the delivery thereof to the said Bank of America, National Trust and Savings Association, and has ever since retained and does still withhold from plaintiff the amount of said check.

IV.

At the times hereinafter set forth, Jackson Motor Sales, a corporation, drew and executed certain of its checks, which said checks are hereinafter more particularly described, upon The Anglo California National Bank, Chico Office, Chico, California, to the order of plaintiff. On or about the date on which each of said checks was drawn and executed, each of said checks was delivered by said Jackson Motor Sales to one Joe Lotz; said Joe Lotz had authority to receive, but no authority to endorse said checks

or any of them, or any check for plaintiff. Thereafter said Joe Lotz endorsed each of said checks in the manner set forth on the back thereof and presented each of said checks to defendant and defendant paid the amount thereof upon said unauthorized endorsement; defendant did thereafter collect the amount of each of said checks in return for the delivery thereof to the said The Anglo California National Bank, Chico Office, Chico, California, and has ever since retained and does still withhold from plaintiff the amount of each of said checks. The number, date of drawing and execution, and the amount of each of said checks is as follows:

No. 4589, Nov. 17, 1950, \$1,599.76; No. 4868, Oct. 13, 1951, \$1,000.00; No. 4902, Nov. 10, 1951, \$800.00.

A true copy of each of said checks is annexed hereto and marked Exhibits G, H, and I, respectively, and said copies are by this reference made a part hereof.

V.

Plaintiff has demanded from defendant the payment of the amounts set forth in paragraphs II, III and IV hereof, but defendant has refused and still refuses to pay the same to plaintiff, and no part thereof has been paid.

VI.

Plaintiff is informed and believes, and on the basis of such information and belief alleges that there may be other checks upon which defendant paid sums to said Joe Lotz upon his unauthorized endorsement in the manner hereinabove set forth.

Plaintiff prays leave to move this Court for leave to amend this complaint with respect to any such check or checks when and if the same are discovered by plaintiff.

Wherefore, plaintiff prays judgment against defendant The Anglo California National Bank of San Francisco, a national banking association, in the sum of Ninety-nine Thousand Twenty-one and Ten Hundredths Dollars (\$99,021.10), with interest thereon at the rate of Seven per cent (7%) per annum as follows:

On \$ 5,547.25 from September 11, 1951;

On \$67,500.00 from September 18, 1951;

On \$11,250.00 from September 25, 1951;

On \$ 3,750.00 from October 1, 1951;

On \$ 6,089.44 from October 16, 1951;

On \$ 1,484.65 from November 21, 1951;

On \$ 1,000.00 from October 18, 1951;

On \$ 800.00 from November 16, 1951;

On \$ 1,599.76 from November 22, 1951;

for its costs of suit herein incurred and for such other and further relief as may be meet in the premises.

/s/ MAYNARD GARRISON,

/s/ JOHN R. PASCOE,

/s/ JOSEPH MARTIN, JR.,

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff

[Endorsed]: Filed February 28, 1952.

In the United States District Court for the Northern District of California, Southern Division

No. 31496

MID-STATES INSURANCE COMPANY, a corporation,
Plaintiff,

vs.

AMERICAN FIDELITY AND CASUALTY COMPANY, INC., a corporation; THE AMERICAN PLAN CORPORATION, a corporation; MARK HART; JOSEPH LOTZ; RALPH L. SMEAD; L. SUDEKUM; JOHN WILL; FIRST DOE; SECOND DOE; THIRD DOE; FOURTH DOE; FIFTH DOE and SIXTH DOE,
Defendants.

COMPLAINT FOR FRAUD

Plaintiff complains of defendants and for cause of action alleges: .

I.

Plaintiff is an insurance corporation organized under the laws of the State of Illinois. Defendant American Fidelity and Casualty Company, Inc. (hereinafter called "American Fidelity"), is an insurance corporation organized under the laws of the State of Virginia and doing business in the State of California. Defendant The American Plan Corporation (hereinafter called "American Plan") is a corporation organized under the laws of the State of New York and was, at all times mentioned herein,

the manager of defendant American Fidelity. Defendant Mark Hart is, and at all times mentioned herein was, President of the defendants American Fidelity and American Plan and is a resident of the State of New York. Defendant L. Sudekum is, and at all times herein mentioned was, Executive Vice President of American Plan and is a resident of the State of New York; plaintiff does not know the full first name of said defendant and prays leave to amend this complaint when the same is ascertained. Defendant John Will is, and at all times mentioned herein was, Treasurer of American Plan and is a resident of the State of New York; Plaintiff does not know the true first name of said defendant and prays leave to amend this complaint when the same is ascertained. Defendants First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe and Sixth Doe are, and at all times mentioned herein were, directors and/or officers and/or agents of defendants American Fidelity and/or American Plan, and are residents of the State of New York; plaintiff does not know the true names of said defendants and prays leave to amend this complaint when the same are ascertained. Defendant Joseph Lotz is, and at all times mentioned herein was, a resident of the State of California and a licensed insurance agent therein, Defendant Ralph L. Smead is, and at all times mentioned herein was, an employee of defendants Lotz, American Fidelity and American Plan and is a resident of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

On or about May 15, 1947, plaintiff appointed defendant Lotz its General Agent for the State of California, and defendant Lotz thereafter procured insurance business for and on behalf of plaintiff. On or about November 7, 1950, defendant American Fidelity appointed defendant Lotz its General Agent for the State of California, and defendant Lotz thereafter procured insurance business for and on behalf of defendant American Fidelity and on and after said date procured insurance business for and on behalf of plaintiff. Defendant Lotz remained plaintiff's General Agent for the State of California until January 21, 1952. Defendant Lotz remained the General Agent for the State of California of defendant American Fidelity until on or about August 17, 1951, when his authority as such was terminated by defendant American Fidelity but said defendant American Fidelity, for its own purposes, did not file the Notice of Termination of Appointment with the Insurance Commissioner of the State of California as required by the California Insurance Code until or on about October 31, 1951.

III.

On or about August 1, 1951, defendant Lotz was indebted to defendant American Fidelity in the sum of approximately \$190,984.00. Defendant Lotz was insolvent on said date and ever since that date has been insolvent, and all the defendants have at all of said times known that defendant Lotz was insolvent.

IV.

Defendant Lotz, as plaintiff's General Agent in the State of California, had a fiduciary relationship to plaintiff. Under the provisions of the Agency Agreement between plaintiff and defendant Lotz and under the appropriate provisions of the laws of the State of California and, especially Section 1730 of the Insurance Code of said state, defendant Lotz was under a duty to plaintiff to hold all premiums received by him on business written for the plaintiff, as trustee for the plaintiff, and all such premiums received by said defendant were received and held in his fiduciary capacity. This fact was well known to all the defendants.

V.

On or about August 1, 1951, the defendants other than defendants Lotz and Smead, conceived and prepared a plan (a) to induce and cause defendant Lotz to pay to defendants American Plan and American Fidelity, funds received by him as premiums on insurance written by him for plaintiff and (b) to apply said funds so received from defendant Lotz to the repayment of the indebtedness of defendant Lotz to American Fidelity, despite the fact that said funds were, and were known to said defendants to be, held as trust funds by defendant Lotz as fiduciary for plaintiff. The plan conceived and prepared by said defendants other than defendants Lotz and Smead, also contemplated and included the reduction and cancellation of the balance of defendant Lotz' indebtedness to defendant

American Fidelity by the cancellation of outstanding insurance written by defendant Lotz for defendant American Fidelity and having such insurance rewritten by defendant Lotz for plaintiff. Said defendants knew full well that defendant Lotz was wholly unable to pay to plaintiff premiums on said rewritten insurance and knew that plaintiff was not aware of defendant Lotz' insolvency and inability to pay to plaintiff the premiums on said insurance to be so rewritten, and said defendants planned to take all action necessary to conceal from plaintiff the fact of defendant Lotz' insolvency and inability to pay said premiums.

VI.

Pursuant to the plan so conceived and prepared by the defendants other than defendants Lotz and Smead, the former caused defendants Lotz and Smead to meet with them on or about August 13, 1951, at which meeting the plan conceived and prepared by the defendants other than Lotz and Smead was communicated to and discussed with defendants Lotz and Smead. Thereupon all the defendants, for the purpose of defrauding and deceiving plaintiff and enriching defendants American Fidelity and American Plan, agreed among themselves that defendant Lotz would pay to defendant American Fidelity and/or American Plan all funds received by him in his fiduciary capacity as trustee and agent for plaintiff, and representing premiums on insurance written by defendant Lotz for the plaintiff. The said defendants also conspired and agreed among themselves to take such action as might be

necessary to conceal defendant Lotz' insolvency from the plaintiff so that the plaintiff would allow defendant Lotz to continue to write insurance for the plaintiff including the rewriting of insurance on behalf of the plaintiff in substitution for insurance previously written by defendant Lotz on behalf of defendant American Fidelity which was to be cancelled by defendant American Fidelity in order to reduce the indebtedness of defendant Lotz to it. Said defendants further conspired and agreed among themselves, for the purpose of defrauding plaintiff for the benefit of defendants American Fidelity and American Plan, that defendant Lotz, in violation of his known fiduciary duty to plaintiff as its agent, would write excessively large amounts of insurance for plaintiff, regardless of the nature of the risks involved and at excessively high advance premiums to sub-agents, so that the defendants would be enabled to divert to defendants American Fidelity and American Plan such premiums as might be collected by defendant Lotz on such insurance from the trust funds held for plaintiff by said defendant Lotz.

VII.

All said defendants thereafter carried out the plan and conspiracy hereinabove referred to in the following manner:

(a) At the direction and instigation of the other defendants and by agreement with them, defendant Lotz fraudulently concealed from the plaintiff: (1) the fact that he was insolvent; (2) the fact that he had agreed to divert to defendants American Fidel-

ity and American Plan all trust funds held or to be received by him for the plaintiff as premiums on insurance written by him for the plaintiff; (3) the fact that he had conspired and agreed with other defendants in the manner aforesaid; (4) the fact that the rewriting of insurance by him on behalf of plaintiff in substitution for insurance previously written by him for defendant American Fidelity was for the sole purpose of enabling American Fidelity to reduce the amount of the otherwise uncollectible indebtedness due it from said defendant Lotz at the expense of plaintiff; (5) the fact that new insurance being written by him for plaintiff would be and was extraordinarily large and excessive in amount, on poor risks, and with high advance premiums to sub-agents; and (6) the fact that he had surrendered to defendants American Fidelity and American Plan, acting through defendants Hart and Smead, full control and authority over his insurance agency and finances. All said defendants, in addition to concealing the aforesaid facts with the purpose and intent, and with the result, of deceiving plaintiff so that plaintiff would not terminate defendant Lotz' Agency Agreement and would consent to defendant Lotz' rewriting insurance in substitution for insurance previously written by him for defendant American Fidelity, affirmatively represented to plaintiff that the reason defendant Lotz desired and intended to write more insurance for plaintiff and less for defendant American Fidelity, and, especially, the reason for his rewriting for plaintiff insurance originally writ-

ten for defendant American Fidelity, was that he had requested said defendant American Fidelity to grant him more favorable terms which said defendant had refused to do.

(b) On or about August 17, 1951, defendants American Fidelity, American Plan, Lotz and Smead, entered into an agreement whereby defendant Smead was appointed the representative of defendants American Fidelity and American Plan, and, as such, given full and complete control and authority over the financial affairs of defendant Lotz and his insurance agency for the purpose of diverting to defendants American Fidelity and American Plan all funds held or received by defendant Lotz, including all trust funds held or received by defendant Lotz and representing premiums on insurance written by said defendant for plaintiff. A true and correct copy of letter from defendant Hart, as President of defendant American Plan, to defendant Smead, dated August 17, 1951, and a true and correct copy of Memorandum of Agreement among defendants American Fidelity, American Plan, Lotz and Smead, dated August 22, 1951, under which defendant Lotz wrongfully abandoned to other defendants control over said trust funds belonging to plaintiff, are attached hereto marked Exhibits 1 and 2, respectively.

(c) Defendants, during the months of August, September, October and November diverted from plaintiff to or for the benefit of defendants American Fidelity and American Plan \$151,781.91 of

trust funds held or received by defendant Lotz as trustee for plaintiff.

(d) By November 1, 1951, by virtue of the diversion to defendants American Fidelity and American Plan of trust funds belonging to plaintiff and their application in reduction of the indebtedness of Lotz to defendant American Fidelity, such indebtedness has been reduced to the sum of approximately \$61,016.00. On or about said date the defendants, acting through defendants Smead and Lotz, caused insurance having a premium value of approximately \$61,016.00 which had originally been written by defendant Lotz for defendant American Fidelity, and in respect of which the assureds thereunder had already paid the premiums therefor, to be rewritten by Lotz for plaintiff, even though said defendants knew that defendant Lotz was wholly unable to pay plaintiff any part of the premiums payable thereon and that, because of defendants' fraudulent concealment and affirmative misrepresentation, plaintiff was unaware of Lotz' inability to pay and unaware also of the true reason for the rewriting of such insurance. Defendant American Fidelity thereupon cancelled the insurance originally written and, by avoiding its obligations thereunder which defendants had shifted to plaintiff, and crediting Lotz' account with defendant American Fidelity with the amount of such premiums, received payment in full of the balance of Lotz' indebtedness to it, all at the expense of plaintiff.

(e) That during all of the times mentioned from and after August 13, 1951, defendants, as part of the plan and scheme described herein, exerted great pressure and influence on defendant Lotz, and thereby induced defendant Lotz to pay excess commissions for insurance business; that the amount of commissions to be paid by defendant Lotz were in excess of the amount to be received by defendant Lotz as his general agency commission; that the business so written could not have failed to, and did, produce a loss to defendant Lotz which further increased the amounts owed by him to plaintiff; that as a result of said pressure and influence defendant Lotz was induced and compelled to accept insurance business of a sub-standard class; that such business could not have failed to, and did, produce an excess loss ratio and consequent underwriting loss to plaintiff; that as a result thereof plaintiff was further damaged in the sum of approximately \$84,300.00.

VIII.

On or about December 1, 1951, plaintiff, for the first time, learned of defendant Lotz' insolvency and thereafter, following an investigation, of the plan and conspiracy of the defendants to defraud and deceive plaintiff and of the various acts done pursuant thereto. Plaintiff promptly terminated its said Agency Agreement with defendant Lotz and demanded of defendants the trust funds held and received by defendant Lotz as trustee for plaintiff, and wrongfully and fraudulently diverted to de-

fendants American Fidelity and American Plan, and further demanded of defendants reimbursement for the large and substantial damages sustained by plaintiff by virtue of the other acts done by defendants Lotz, Smead, American Fidelity and American Plan in agreement with and at the instigation and direction of all the defendants in violation of Lotz' fiduciary duty to plaintiff, but defendants refused and still refuse to pay said sums or any portion thereof to plaintiff. Defendant Lotz is wholly unable to pay to plaintiff any part of his large and admitted indebtedness to plaintiff.

IX.

Plaintiff has, as a result of said plan and conspiracy of defendants to defraud and deceive it, and of the various acts done, permitted, directed and suffered by said defendants pursuant thereto, been damaged in the sum of \$297,097.91.

X.

In doing and permitting the things herein alleged, defendants have been guilty of fraud and deceit and have been actuated by malice towards plaintiff, and by reason thereof plaintiff demands exemplary and punitive damages against defendants in the sum of \$50,000.00.

Wherefore, plaintiff prays judgment against defendants and each of them for the sum of \$297,097.91, for the sum of \$50,000.00 as exemplary and punitive damages, for its costs of suit incurred

herein, and for such other and further relief as may be proper in the premises.

/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON
& RAY,
Attorneys for Plaintiff

EXHIBIT No. 1

The American Plan Corporation
44 Wall Street, New York, N. Y.

Mr. Ralph L. Smead August 17, 1951
315 Fourteenth Street, Oakland, California

Dear Mr. Smead:

Under even date memorandum of agreement has been executed by Joseph Lotz which in part stipulates that you will serve as the representative of American Plan Corporation with respect to the ultimate liquidation of all monies referred to in Paragraphs 1 and 2 in said agreement.

As the representative of this corporation, you have full authority to deposit to the account of The American Fidelity and Casualty Company at the Central Bank in Oakland all monies received by Lotz, after taking into consideration the deduction prescribed in said agreement. You are to have full and supreme authority regarding financial affairs of Joseph Lotz, subject to instructions that may be transmitted to you from time to time by The American Plan Corporation, and in the event that you are

prevented from performing your responsibility in any respect it will be your duty to notify immediately The American Plan Corporation.

In consideration of the proper performance of your duties as representative and in the event the items referred to in Paragraphs 1 and 2 of said agreement are completely liquidated by September 15, 1951, you are to receive a fee from us in the sum of \$1,000.

Very truly yours,

/s/ MARK M. HART,
President

EXHIBIT No. 2

Memorandum of Agreement between American Fidelity and Casualty Company, Inc., (hereinafter called The Company), The American Plan Corporation (hereinafter called the Manager) and Joseph Lotz (hereinafter called Lotz). Dated August 22, 1951.

In consideration of the promises herein contained and other good and valuable consideration, it is understood among the Company, the Manager and Lotz as follows:

1. Lotz as a former agent of the Company has collected or has in the course of collection premiums on the behalf of the Company amounting to approximately \$240,000. (as evidenced by accounts current compiled and to be compiled by the Man-

ager) which have not been remitted to the Company or the Manager.

2. Lotz is also obligated to pay to the Company a sum approximating \$7,000. in connection with a reinsurance transaction.

3. Lotz agrees that all the monies referred to in Paragraphs 1 and 2 will be paid to the Company on or before September 15, 1951, and Lotz agrees that payments on account of said sums will be made by him at intervals as frequent as possible between the date of this agreement and September 15, 1951.

4. Commencing immediately all premiums received by Lotz will be deposited directly to the account of the Company at the Central Bank, Oakland, California; Lotz may deduct therefrom a sum not to exceed 10% for operating expenses, which deductions shall be a charge against Lotz and shall likewise be paid to the Company on or before September 15, 1951.

5. Despite termination of Lotz' agency agreement and subject to further instructions of the Manager, Lotz will

(a) Take all necessary steps to collect premiums from sub-agents and assureds and failing to collect will effect cancellations in accordance with established practice.

(b) Supervise and pay losses and loss adjustment expenses.

(c) Effect collection of salvage and subrogation.

(d) Use his best efforts in every respect to protect the interests of the Company.

6. The Manager agrees, termination of the

agency agreement notwithstanding, to credit Lotz monthly with commissions of 20% upon earned premiums as provided in the agency agreement dated November 7, 1950, but the Manager shall have the right to withhold payment thereof as an offset against monies due from Lotz to the Company or monies advanced by the Manager to the Company on Lotz' behalf. This Paragraph 6 in no wise shall affect provisions of said agency agreement relating to the withholding of commissions earned in excess of said 20%.

7. So long as any of the items referred to in Paragraphs 1 and 2 shall remain outstanding Lotz will

(a) Maintain his Trustee account at Central Bank, Oakland, and not open a Trustee account at any other bank or trust company.

(b) Not draw from the agency for himself a sum in excess of \$150 a week and will not increase the salaries of any employees except with the specific consent of the Manager or its representative.

(c) Not draw any sums for travel, entertainment, etc., without the specific consent of the Manager or its representative.

(d) Not make any capital expenditures without the specific consent of the Manager or its representative.

8. The Manager hereby appoints Ralph L. Smead as its representative and Lotz agrees that the said representative shall have full authority over the

finances of the agency and in connection with the matters referred to herein subject to instructions of the Manager. It is understood that the designation of Smead as representative shall be at the pleasure of the Manager and that the Manager may terminate such appointment and appoint a substitute representative at its discretion which substitute shall have the same authority as the original a representative by the Manager shall cease when a representative by the Manager shall cease when the items referred to in Paragraphs 1 and 2 hereof are fully satisfied.

9. Lotz agrees that expenses incurred by the Manager in connection with liquidation of the items referred to in Paragraphs 1 and 2 hereof and in the operation and implementation of this agreement shall be proper charges against Lotz.

10. Except as specifically provided herein, it is understood that this memorandum of agreement shall not be deemed a waiver of any obligations of Lotz or rights of the Company or the Manager under the aforesaid agency agreement of November 27, 1950, or otherwise. Without any limitation on the foregoing, it is agreed that in the event of a default by Lotz of any of the provisions of this Memorandum of Agreement, the Company may without notice exercise its rights under Paragraph 4 of the aforesaid agency agreement to take over and vest in itself Lotz' records, use and control of expirations.

11. The parties hereto agree to execute such

further and other documents as may be necessary to carry out the intentions and objectives of this Memorandum of Agreement.

American Fidelity and Casualty Com-
pany, Inc.,

The American Plan Corporation,

/s/ By Mark M. Hart, Pres., Mgr.,

The American Plan Corporation,

/s/ Mark M. Hart, Pres.

/s/ Joseph Lotz (L.S.)

Agreed:

/s/ Ralph L. Smead

[Endorsed]: Filed April 28, 1952.

[Title of District Court and Cause 31311.]

ANSWER

Comes now the Defendant, The Anglo California National Bank of San Francisco, a national banking association, and answering the Complaint of Plaintiff on file herein admits, denies and avers as follows, to-wit:

I.

Answering Paragraph I thereof, admits the allegations contained therein.

II.

Answering Paragraph II thereof, this Defendant has no information or belief upon and concerning

the matters therein alleged and for want of such information and belief denies each and every, all and singular, the allegations contained therein.

III.

Answering Paragraph III thereof, this Defendant has no information or belief upon and concerning the matters therein alleged and for want of such information and belief denies each and every, all and singular, the allegations contained therein.

IV.

Answering Paragraph IV thereof, this Defendant has no information or belief upon and concerning the matters therein alleged and for want of such information and belief denies each and every, all and singular, the allegations contained therein.

V.

Answering Paragraph V thereof, admits that Defendant has refused and still refuses to pay the amounts as alleged and denies that Plaintiff has demanded payment thereof from Defendant and that no part thereof has been paid.

VI.

Answering Paragraph VI thereof, this Defendant has no information or belief upon and concerning the matters therein alleged and for want of such information and belief denies each and every, all and singular, the allegations contained therein.

First Affirmative Defense

As a further separate and First Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That at all of the times alleged and upon each of the occasions referred to in the Complaint of Plaintiff on file herein, the said Joe Lotz therein referred to was the duly authorized and acting general agent of Plaintiff and as such general agent (pursuant to an agreement in writing between Plaintiff and the said Joe Lotz, a copy of which, entitled "Agency Agreement" is attached hereto, marked as Exhibit "A" and made a part hereof, and statements and representations made by Plaintiff to the said Joe Lotz) at all of the times and upon each of the occasions alleged in the Complaint of Plaintiff on file herein the said Joe Lotz was authorized and empowered by Plaintiff to receive and receipt for all of the funds referred to in the said Complaint of Plaintiff and to endorse the checks therein set forth.

Second Affirmative Defense

As a further separate and Second Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That at all the times alleged and upon each of the occasions referred to in the complaint of Plain-

tiff on file herein and pursuant to an agreement in writing between Plaintiff and the said Joe Lotz, a copy of which, entitled "Agency Agreement", is attached hereto and made a part hereof, the said Joe Lotz therein referred to was the duly authorized and acting general agent of Plaintiff and as such general agent empowered, authorized and required to collect, receive and receipt for premiums and to do everything necessary or proper and usual in the ordering course of business for effecting the purpose of the agency.

II.

That pursuant to the said Agency Agreement, a copy of which is attached hereto and made a part hereof, the said Joe Lotz was authorized and empowered to collect and hold premiums on business written for the Plaintiff for the period of sixty (60) days after the end of the month in which the business was written, and the said Joe Lotz was required by the aforementioned "Agency Agreement" to hold premiums received by the said Joe Lotz as the trustee for the Plaintiff.

III.

That each of the checks referred to in the Complaint of Plaintiff on file herein and the funds represented thereby were delivered to the said Joe Lotz as the general agent of Plaintiff and in payment of premiums on policies of insurance written and arranged for by the said Joe Lotz as general agent of the Plaintiff.

IV.

That in order to collect, receive and hold the premiums and to carry out his duties and obligations as such general agent and trustee of Plaintiff it was necessary, proper, usual and in the ordinary course of business for effecting the purpose of such agency to endorse each of the checks referred to in the Complaint of Plaintiff on file herein.

Third Affirmative Defense

As a further separate and Third Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That at all of the times alleged and upon each of the occasions referred to in the Complaint of Plaintiff on file herein the said Joe Lotz, with the knowledge, consent and authority of Plaintiff, did represent and hold himself out as having authority to receive and endorse in the name of Plaintiff checks made payable to Plaintiff in payment of premiums on policies written by Joe Lotz as the general agent of and for Plaintiff, pursuant to said "Agency Agreement", a copy of which is attached hereto, and Defendant had no actual knowledge or notice that the said Joe Lotz did not have authority, if such be the fact, to endorse in the name of Plaintiff checks made payable to Plaintiff.

Fourth Affirmative Defense

As a further separate and Fourth Affirmative De-

fense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That on or about the first day of September, 1951 Plaintiff and the said Joe Lotz referred to in the Complaint of Plaintiff on file herein entered into an agreement entitled "Agency Agreement", a copy of which is attached hereto, marked Exhibit "A" and made a part hereof.

II.

That at all of the times alleged and upon each of the occasions referred to in the Complaint of Plaintiff on file herein, the said Joe Lotz, with the knowledge, consent and authority of Plaintiff, did represent and hold himself out as having authority to use and employ the premiums paid to and collected by him in order to carry out his business of being the general agent of Plaintiff in performing the matters and things contemplated and undertaken pursuant to the said "Agency Agreement", a copy of which is attached hereto.

III.

That pursuant to the aforesaid authorized representation and holding out the said Joe Lotz had ostensible authority to endorse the checks referred to and specified in the Complaint of Plaintiff, and the power to so endorse was a necessary and reasonable power to effectuate the above-mentioned authority to use and employ premiums paid to and collected by him.

IV.

That Defendant had no actual knowledge or notice that the said Joe Lotz did not have authority, if such be the fact, to use and employ the premiums paid to and collected by him in order to carry out his business of being the general agent of Plaintiff in performing the matters and things contemplated and undertaken pursuant to said "Agency Agreement", a copy of which is attached hereto.

Fifth Affirmative Defense

As a further separate and Fifth Affirmative Defense to the complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That Plaintiff is estopped from claiming and asserting that Joe Lotz had no authority to endorse the checks referred to in the Complaint of Plaintiff on file herein by reason of the following facts and circumstances, to-wit:

(a) That on or about the 1st day of September, 1951, Plaintiff and the said Joe Lotz entered into an agreement in writing entitled "Agency Agreement, a copy of which is attached hereto and marked as Exhibit "A" and made a part hereof.

(b) That at all times Plaintiff did know and consent and did so notify and instruct the said Joe Lotz to use and employ and have access to the premiums paid to and collected by him in order to conduct and carry out the business of being the general agent of Plaintiff and in performing the

matters and things contemplated and undertaken pursuant to the said "Agency Agreement".

(c) That at all times since the Plaintiff and the said Joe Lotz entered into the said "Agency Agreement", Plaintiff knew and had actual knowledge of the fact that the said Joe Lotz was receiving and endorsing in the name of Plaintiff checks made payable to Plaintiff in payment of premiums on policies written by the said Joe Lotz as the general agent for Plaintiff, pursuant to said "Agency Agreement".

(d) That on occasions Plaintiff has stated and acknowledged that the said Joe Lotz had authority from Plaintiff to receive and endorse in the name of Plaintiff checks made payable to Plaintiff in payment of premiums on policies written by the said Joe Lotz as the general agent for Plaintiff pursuant to said "Agency Agreement".

(e) That Plaintiff knew that the said Joe Lotz did represent to Defendant and to others that he was authorized and had the authority to receive and endorse checks in the name of Plaintiff made payable to Plaintiff in payment of premiums on policies written by the said Joe Lotz as the general agent for Plaintiff pursuant to said "Agency Agreement".

(f) That Plaintiff knew that the said Joe Lotz was receiving and endorsing checks in the name of Plaintiff, made payable to Plaintiff in payment of premiums on policies written by the said Joe Lotz as the agent for Plaintiff, pursuant to said "Agency Agreement" and depositing the same in a trustee account with Defendant and notwithstanding that Plaintiff knew of the same, Plaintiff failed and re-

fused to inform or otherwise advise Defendant that the said Joe Lotz had no authority, if such be the fact, to endorse the same as alleged in the Complaint on file herein.

Sixth Affirmative Defense

As a further separate and Sixth Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That Defendant is informed and believes and upon such information and belief alleges the fact to be that Plaintiff has received each and all of the sums represented by and referred to in each of the checks referred to and specified in the Complaint of Plaintiff on file herein.

Seventh Affirmative Defense

As a further separate and Seventh Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That on or about the 27th day of November, 1951, in order to secure and effect payments to Plaintiff of the sums referred to in the Complaint of Plaintiff on file herein, and in particular the proceeds of the checks described and specified therein, the said Joe Lotz referred to in the Complaint of Plaintiff on file herein, did execute and deliver to Plaintiff the power of attorney and assignment in the

form of the exhibits attached hereto, marked as Exhibits "B" and "C", respectively, and made a part hereof, whereby and as a result of which Defendant is informed and believes and upon such information and belief alleges the fact to be that Plaintiff has received money and other things of value equal to or in excess of the indebtedness referred to in the Complaint of Plaintiff on file herein, and in particular equal to or in excess of sums and proceeds from the checks specified therein.

Eighth Affirmative Defense

As a further separate and Eighth Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That on or about the 1st day of September, 1951, Plaintiff and the said Joe Lotz referred to in the Complaint of Plaintiff on file herein entered into an agreement in writing entitled "Agency Agreement", a copy of which is attached hereto, marked as Exhibit "A" and made a part hereof.

II.

That pursuant to the said "Agency Agreement" the said Joe Lotz had and was possessed of an interest in the funds and proceeds represented by each of the checks referred to and specified in the Complaint, and Defendant is informed and believes and upon such information and belief alleges the fact to be that Plaintiff is not the sole owner thereof.

Wherefore, Defendant prays that Plaintiff take nothing by its Complaint on file herein and that Defendant have judgment against Plaintiff for its costs of suit incurred herein and for such other and further relief as to the Court may seem meet and proper in the premises.

SEVERSON & McCALLUM,
/s/ By ALMON B. McCALLUM,
Attorneys for Defendant
WORTHINGTON, PARK &
WORTHINGTON,
/s/ By WM. WORTHINGTON,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed May 5, 1952.

[Title of District Court and Cause No. 31496.]

ANSWER

Defendant, Ralph L. Smead, for Answer to plaintiff's Complaint on file herein, admits, denies, and alleges as follows:

I.

As to Paragraph I thereof, this defendant admits he is a resident of the State of California. Admits employment by the defendant, Joseph Lotz, and the defendant, The American Plan Corporation, but that said employment by The American Plan Corporation occurred at times other than alleged in said complaint. Denies he was at any time employed by the American Fidelity and Casualty Company, Inc.

As to all other allegations contained in said paragraph, this defendant alleges he is without knowledge or information sufficient to form a belief as to the truth thereof.

II.

As to Paragraphs II, III, and IV thereof, this defendant alleges that he is without information sufficient to form a belief as to the truth of the allegations contained therein.

III.

Denies each and every allegation contained in Paragraphs V, VI, VII, IX, and X thereof.

IV.

As to Paragraph VIII this defendant admits that plaintiff did terminate the defendant Lotz' Agency Agreement. Denies each and every other allegation therein contained.

Wherefore, this defendant prays that plaintiff take nothing by its complaint and that he be allowed costs incurred.

/s/ BYRON L. DUSKY,
Attorney for Defendant Ralph L.
Smead

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 14, 1952.

[Note: Answer of Defendant Joseph Lotz in Action numbered 31496 has already been printed in Appeal No. 13756 in the United States Court of Appeals for the Ninth Circuit.]

[Title of District Court and Cause No. 31496.]

ANSWER OF DEFENDANTS AMERICAN
FIDELITY AND CASUALTY COMPANY,
INC. a corporation, and THE AMERICAN
PLAN CORPORATION, a corporation, TO
COMPLAINT; and COUNTERCLAIMS

Come Now the Defendants American Fidelity and Casualty Company, Inc., a corporation, (hereinafter called "American Fidelity") and The American Plan Corporation, a corporation, (hereinafter called "American Plan"), referred to hereinafter as "Defendants", and in answer to the complaint herein, admit, deny and allege as follows:

I.

Admit that plaintiff is an insurance corporation organized under the laws of the State of Illinois. Answering the allegations beginning with the word "defendant", line 27, page 1, and ending with the word "New York", line 11, page 2, Defendants admit the allegations therein contained, except that Defendants deny that American Plan is or was the manager of any of the business of American Fidelity except its United States automobile physical damage insurance business, and deny that defendant Mark Hart is or has ever been president of American Fidelity, and deny that defendants L. Sudekum and H. Arthur Will, (sued herein as "John Will"), are, or that either of them is, a resident of the State of New York.

Answering the allegations beginning with the word "plaintiff," lines 12 and 13, page 2, and ending with the word "therein", line 22, page 2, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said allegations.

Answering the allegations beginning with the word "Defendant", line 22, page 2, and ending with the word "California", line 25, page 2, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of the averments that defendant Ralph L. Smead is and at all times mentioned in the Complaint has been an employee of defendants Lotz and that he is a resident of the State of California, or of any of said averments. Further answering said allegations, Defendants admit that Ralph L. Smead now is, and, since January 22, 1952, has been an employee of American Plan, and except as so admitted or denied, Defendants deny each and every of said allegations.

II.

Answering the allegations of paragraph II beginning with the word "On", line 28, page 2, and ending with the word "plaintiff", line 31, page 2, and beginning with the words "and on and after", lines 2 and 3, page 3 and ending with the figure "1952", line 5, page 3, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said allegations.

Answering the allegations beginning with the word "On", line 31, page 2, and ending with the word "Fidelity", line 2, page 3, Defendants allege that on or about November 27, 1950, American Fidelity appointed defendant Lotz its agent for the State of California with power to accept proposals for insurance covering such automobile risks as American Fidelity might authorize to be insured, and to charge the premiums for such proposals, and to collect premiums on insurance tendered by defendant Lotz to and accepted by American Fidelity, and subject to approval by American Fidelity to adjust losses, and defendant Lotz as such agent thereafter procured insurance for and on behalf of American Fidelity, and except as herein alleged Defendants deny each and every of said allegations.

Answering the allegations beginning with the word "Defendant", line 5, page 3, and ending with the figure "1951", line 13, page 3, Defendants allege that defendant Lotz remained the agent of American Fidelity with the powers hereinabove specified until on or about August 22, 1951, and except as herein alleged Defendants deny each and every of said allegations.

III.

Answering the allegations of paragraph III, Defendants allege that on or about August 1, 1951 defendant Lotz was indebted to American Fidelity in the sum of approximately \$205,111.95, rather than the amount alleged in the complaint. Defendants state that they have no knowledge or

information sufficient to form a belief as to the truth of the allegation that defendant Lotz was insolvent on or about August 31, 1951 or at any other date. Except as so alleged and denied, Defendants deny each and every of said allegations, and further specifically deny that Defendants have known at all times or at any time that defendant Lotz was insolvent.

IV.

Answering the allegations of paragraphs IV, V and VI, Defendants deny each and every allegation therein contained.

V.

Answering the allegations of sub-section (a) of paragraph VII, Defendants deny each and every allegation therein contained.

VI.

Answering the allegations of sub-section (b) of paragraph VII, Defendants admit the execution of the letter Exhibit 1 to the Complaint and the agreement Exhibit 2 thereto, and in that respect allege that both said letter and agreement were executed on the same date, namely on or about August 22, 1951, and that the date August 17, 1951 on the letter Exhibit 1 was due to an error, and except as herein admitted and alleged deny each and every of said allegations.

VII.

Answering the allegations of sub-section (c) of paragraph VII, Defendants deny each and every of said allegations, and further specifically deny

that Defendants diverted from plaintiff at any time or at all the sum of \$151,781.91 or any other amount.

VIII.

Answering the allegations of sub-section (d) of paragraph VII, Defendants allege that on or about November 1, 1951, American Plan and plaintiff entered into an agreement under the terms of which certain automobile insurance policies, carrying the aggregate unexpired premiums of approximately \$61,016.00, which policies had been written by American Fidelity through defendant Lotz as its agent, were to be cancelled forthwith and said policies were to be rewritten at once by plaintiff. Except as herein alleged, Defendants deny each and every of said allegations.

IX.

Answering the allegations of sub-section (e) of paragraph VII, Defendants deny each and every of said allegations, and specifically deny that plaintiff has been damaged in the sum of \$84,300.00 or in any other amount.

X.

Further answering the allegations of paragraph VII, Defendants deny that the plan or conspiracy therein referred or any such plan or conspiracy ever existed or was carried out.

XI.

Answering the allegations of paragraph VIII, Defendants, while at all times denying the con-

spiracy, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments that defendant Lotz was insolvent on or about December 1, 1951 and that plaintiff learned for the first time of defendant Lotz' insolvency on or about December 1, 1951, and that defendant Lotz is wholly unable to pay plaintiff any part of his indebtedness to plaintiff, or of any of said averments. Defendants further allege that they first learned of the amount of plaintiff's demands on or about March 31, 1952 and that Defendants then refused to pay to plaintiff the sum demanded or any portion thereof. Except as herein denied and alleged, Defendants deny each and every allegation therein contained.

XII.

Answering the allegations of paragraph IX, Defendants deny each and every of said allegations, and especially deny that plaintiff has been damaged in the sum of \$297,097.91 or in any sum at all.

XIII.

Answering the allegations of paragraph X, Defendants deny each and every of said allegations, and especially deny that plaintiff has been damaged in the sum of \$50,000 or in any sum at all.

Wherefore Defendants pray as hereinafter set forth.

As and for a Separate and Further Defense, Defendants allege, on information and belief:

XIV.

Plaintiff claims that on or about December 26, 1951, defendant Lotz was indebted to plaintiff in a sum exceeding Four Hundred Thousand Dollars (\$400,000.00). On or about that date defendant Lotz submitted to plaintiff an offer to liquidate said indebtedness, which offer, if it had been accepted by plaintiff, would have reduced the indebtedness of defendant Lotz to plaintiff to approximately \$32,500.00. Plaintiff intentionally and wilfully omitted to accept said offer, and said omission is the proximate cause of plaintiff's loss, if any there was.

First Counter-Claim

As and for a Separate and Further Defense, and as a First Counter-Claim, Defendants allege:

XV.

During all the times herein mentioned, American Fidelity has been, and now is, an insurance corporation organized under the laws of the State of Virginia and doing an insurance business in the State of California and in other states. During all the times herein mentioned, American Plan has been, and now is, a corporation organized under the laws of the State of New York and manager of the United States automobile physical damage insurance business of American Fidelity. During all the times herein mentioned, plaintiff was, and now is, an insurance corporation organized under the laws of the State of Illinois and doing business in the State of California.

XVI.

Defendant Lotz acted as the agent of American Fidelity as above stated for the period from November 27, 1950, to August 22, 1951, and during that period and for some time thereafter Lotz collected premiums on insurance written by American Fidelity through Lotz as such agent. During that period Lotz was also agent for plaintiff as above stated and collected premiums on insurance written by plaintiff through him as such agent.

XVII.

In its complaint herein plaintiff alleges that some monies collected by Lotz as premiums on insurance written for plaintiff were wrongfully paid by Lotz to American Plan as agent for American Fidelity. American Plan and American Fidelity deny such fact. If, however, it should be determined in this action that any monies belonging to plaintiff have been paid to Defendants, or either of them, under circumstances under which Defendants, or either of them, should be liable to plaintiff therefor, then Defendants allege that since the time when defendant Lotz became the agent of American Fidelity on November 27, 1950, premiums in substantial amounts collected by him on insurance written for American Fidelity were paid by him to plaintiff herein, and that in making such payments to plaintiff Lotz was acting as the agent of plaintiff and in the course of such agency. Defendants do not at present know the amount of said monies and they therefore ask that when said

amount shall have been determined, it be set off against any monies belonging to plaintiff which may have been paid to Defendants and for which Defendants may be liable to plaintiff.

Second Counter-Claim

As and for a Separate and Further Defense, and as a Second Counter-Claim, American Fidelity alleges:

XVIII.

During all the times herein mentioned, plaintiff was and now is an insurance corporation organized under the laws of the State of Illinois and doing an insurance business in the State of California.

XIX.

During all the times herein mentioned, American Fidelity has been, and now is, an insurance corporation organized under the laws of the State of Virginia and doing an insurance business in more than forty states of the United States, including the State of California. In some of these states American Fidelity has been so engaged for more than twenty-five years. American Fidelity has thereby built up good will with the insuring public, and with insurance brokers and agents, and with commissioners of insurance of various states, which good will is a valuable asset of American Fidelity.

XX.

During all the times herein mentioned defendant

Lotz was the general agent of plaintiff for the State of California.

XXI.

On or about November 1, 1951, American Fidelity entered into an agreement with plaintiff whereby said parties agreed that certain automobile physical damage insurance policies carrying aggregate unexpired premiums of approximately \$61,016.00, which had been written by American Fidelity in California, were to be forthwith cancelled and said policies at once rewritten by plaintiff with identical coverage, and that such cancellation and rewriting were to be effective as of the beginning of said policy period. For that purpose said parties agreed that defendant Lotz would at once prepare and send to the assureds under said policies of American Fidelity notices that said policies had been cancelled, as above stated, and that the same had been rewritten by plaintiff, as above stated, and that policies of plaintiff evidencing such insurance by plaintiff would be forthwith forwarded to such assureds.

XXII.

Pursuant to said agreement, defendant Lotz prepared said notices of cancellation and of rewriting of insurance, and on or about November 7, 1951, sent such notices to the assureds under said policies, but plaintiff, in violation of its agreement, refused and failed to send its policies to such assureds until on or about December 31, 1951.

XXIII.

Between the time that such notices of cancellation were sent out and the time the assureds under said policies of American Fidelity received their new policies from plaintiff as above stated, numerous communications from such assureds were sent to the office of defendant Lotz, which communications contained claims for losses under said policies and notices of cancellation thereof and requests for return of premiums and requests for substitution of automobiles and various other matters in respect of such policies. Said communications were ignored by plaintiff during said period.

XXIV.

The failure of receipt by such assureds of their new policies during such period after receipt of notice of cancellation of their American Fidelity policies, and their said failure to procure prompt responses to their communications and prompt action in respect thereto, caused grave dissatisfaction with American Fidelity among such assureds, and as a result thereof many of such assureds complained of said facts to the Commissioner of Insurance of California, and various complaints of such neglect were made by assureds to various other persons including persons in the insurance business in California.

XXV.

American Fidelity has at all times fully per-

formed all the terms and conditions of said agreement on its part to be performed.

XXVI.

As a direct and proximate result of plaintiff's said breach of its agreement, American Fidelity has suffered loss of business and injury to its reputation and good will and other damage and has thereby been damaged in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Third Counter-Claim

As and for a Separate and Further Defense, and as a Third Counter-Claim, Defendants allege:

XXVII.

During all the times herein mentioned, plaintiff was and now is an insurance corporation organized under the laws of the State of Illinois and doing an insurance business in the State of California.

XXVIII.

During all the times herein mentioned, American Fidelity has been, and now is, an insurance corporation organized under the laws of the State of Virginia and doing an insurance business in more than forty states of the United States, including the State of California. In some of these states American Fidelity has been so engaged for more than twenty-five years. During all the times herein men-

tioned, American Plan has been, and now is, a corporation organized under the laws of the State of New York and since about December 1, 1949, manager of the United States automobile physical damage insurance business of American Fidelity. Defendants have thereby built up good will with the insuring public, and with insurance brokers and agents, and with commissioners of insurance of various states, which good will is a valuable asset of Defendants, and of each of them.

XXIX.

On several occasions since approximately December 1, 1951, plaintiff, acting by its president and other authorized agents whose names are at present unknown to Defendants, made the following statements to representatives of other companies engaged in the insurance business in the United States and to various other persons: (1) That Defendants by concealments and misrepresentations, had induced plaintiff to enter into an agreement to re-write certain insurance, which insurance had previously been written by American Fidelity, and that Defendants were thereby guilty of dishonorable practices; (2) That Defendants had improperly induced and compelled defendant Lotz as an insurance agent to divert from the true owner or owners thereof certain funds which were in his possession as such agent and to convert such funds to the use of other than such true owner or owners thereof; and (3) That Defendants and their officers and representatives were guilty of dishonest business prac-

tices. Such statements were made with the intent to injure Defendants in their said businesses.

XXX.

Said statements were, and each of them was, false and defamatory.

XXXI.

By reason of said false statements, each of the Defendants has been greatly injured in its business and reputation, and in its relations with its customers and the insuring public, and with insurance brokers and agents, and with commissioners of insurance of various states, to the damage of each of said Defendants in the sum of Five Hundred Thousand Dollars (\$500,000.00).

Wherefore Defendants pray:

1. That plaintiff take nothing by its complaint;
2. That Defendant, The American Plan Corporation, have judgment against plaintiff in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00);
3. That Defendants, American Fidelity and Casualty Company, Inc. and The American Plan Corporation, each have judgment against plaintiff in the sum of Five Hundred Thousand Dollars (\$500,000.00);
4. That Defendants have judgment against plain-

tiff for their costs of suit and for such other and further relief as may be proper in the premises.

Dated: June 30, 1952.

/s/ HAROLD R. McKINNON,
/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Defendants, American Fidelity and Casualty Company, Inc. and The American Plan Corporation.

Acknowledgment of Service attached.

[Endorsed]: Filed June 30, 1952.

[Title of District Court and Cause No. 31496.]

COMPLAINT IN INTERVENTION

Comes Now, The Anglo California National Bank of San Francisco, a national banking association, plaintiff in intervention, and by leave of Court first had and obtained, and for a cause of action against defendants above-named, and each of them, alleges as follows, to-wit:

I.

That at all times herein mentioned The Anglo California National Bank of San Francisco (hereinafter called "Anglo Bank"), plaintiff in intervention, was and now is a national banking association organized and existing under the laws of the United States of America and authorized to transact, and

transacting, a general banking business in the State of California, with its principal place of business in the City and County of San Francisco, State of California.

II.

That at all times herein mentioned Mid-States Insurance Company (hereinafter called "Mid-States"), plaintiff above named, was and now is a corporation organized and existing under the laws of the State of Illinois.

III.

That at all times herein mentioned American Fidelity and Casualty Company, Inc. (hereinafter called "American Fidelity"), one of the defendants, was and now is an insurance corporation organized and existing under the laws of the State of Virginia and doing business in the State of California.

IV.

That at all times herein mentioned The American Plan Corporation (hereinafter called "American Plan"), one of the defendants, was and now is a corporation organized and existing under the laws of the State of New York, and at all times herein mentioned was and now is the manager of American Fidelity.

V.

That at all times herein mentioned Mark Hart, one of the defendants, was and now is the President of American Fidelity and of American Plan, and was and now is a resident of the State of New York.

VI.

That at all times herein mentioned L. Sudekum, one of the defendants, was and now is Executive Vice-President of American Plan, and a resident of the State of New York, that Anglo Bank does not know the full first name of said defendant and prays leave to amend this complaint in intervention when the same is ascertained.

VII.

That at all times herein mentioned John Will, one of the defendants, was and now is Treasurer of American Plan and a resident of the State of New York; that Anglo Bank does not know the full first name of said Defendant and prays leave to amend this complaint in intervention when the same is ascertained.

VIII.

That at all times herein mentioned the defendants First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe and Sixth Doe, were and now are directors and/or officers and/or agents of American Fidelity and/or American Plan, and residents of the State of New York. Anglo Bank does not know the true names of said defendants and prays leave to amend this complaint in intervention when the same are ascertained.

IX.

That at all times herein mentioned Joseph Lotz, one of the defendants, was and now is a resident of the State of California, and at all times herein mentioned was a licensed insurance agent therein

and a duly appointed General Agent of Mid-States and of American Fidelity for the State of California.

X.

That at all times herein mentioned Ralph L. Smead, one of the defendants, was and now is a resident of the State of California, and at all times herein mentioned was an employee of American Fidelity, American Plan and Joseph Lotz.

XI.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

XII.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that on or about May 15, 1947 Mid-States appointed Joseph Lotz its General Agent for the State of California; that the said Joseph Lotz thereafter procured insurance business for and on behalf of Mid-States; and that the said Joseph Lotz remained and continued to be the General Agent of Mid-States in the State of California until January 21, 1952.

XIII.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that on or about November 7, 1950 American Fidelity appointed Joseph Lotz its General Agent for the State of California; that the said Joseph Lotz thereafter procured insurance business for

and on behalf of American Fidelity; that the said Joseph Lotz remained and continued to be the General Agent of American Fidelity for the State of California until on or about August 17, 1951, when his authority as such was terminated by American Fidelity, and that American Fidelity for its own purposes did not file the Notice of Termination of Appointment with the Insurance Commissioner of the State of California, as required by the California Insurance Code until on or about October 31, 1951.

XIV.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that on or about August 1, 1951 Joseph Lotz was indebted to American Fidelity in the approximate sum of One Hundred Ninety Thousand Nine Hundred Eighty-four Dollars (\$190,984.00); that on said date Joseph Lotz was insolvent, and ever since that date has been insolvent, and that each of the defendants named above have at all of said times known that Joseph Lotz was insolvent.

XV.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that on or about August 1, 1951 the defendants above-named, other than the defendants Joseph Lotz and Ralph L. Smead, conceived and prepared a plan, (a) to induce and cause Joseph Lotz to pay to American Fidelity and American Plan funds received by him as premiums on insurance business

procured by him for and on behalf of Mid-States; (b) to apply such funds so received from Joseph Lotz to the repayment of the indebtedness of Joseph Lotz to American Fidelity, notwithstanding that said funds were, and were known to said defendants to be, funds received by Joseph Lotz as premiums on insurance business procured by him on behalf of Mid-States; (c) to reduce and cancel the balance of the indebtedness of Joseph Lotz to American Fidelity by the cancellation of outstanding insurance business procured by Joseph Lotz for and on behalf of American Fidelity and having such insurance rewritten by Joseph Lotz for Mid-States, notwithstanding that said defendants knew full-well that Joseph Lotz was wholly unable to pay Mid-States premiums on said rewritten insurance and that Mid-States and Anglo Bank were not aware of the insolvency and inability of Joseph Lotz to pay Mid-States the premiums on said insurance to be so rewritten; and (d) to take all action necessary to conceal from Mid-States and Anglo Bank the fact of the insolvency and inability of Joseph Lotz to pay said premiums.

XVI.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that pursuant to the said plan so conceived and prepared by the defendants other than Joseph Lotz and Ralph L. Smead, the former caused Joseph Lotz and Ralph L. Smead to meet with them on or about August 13, 1951, at which meeting the plan conceived and prepared by the defendants

other than Joseph Lotz and Ralph L. Smead was communicated to and discussed with the said Joseph Lotz and Ralph L. Smead; that thereupon all of the defendants, and for the purpose of defrauding and deceiving Mid-States and Anglo Bank, and enriching American Fidelity and American Plan, agreed among themselves that Joseph Lotz would pay to American Fidelity and/or American Plan all funds received by him as premiums for insurance business procured by Joseph Lotz for and on behalf of Mid-States; that said defendants also conspired and agreed among themselves to take such action as might be necessary to conceal insolvency of Joseph Lotz so that Joseph Lotz might continue to write insurance for Mid-States, including the re-writing of insurance on behalf of Mid-States in substitution for insurance previously written by Joseph Lotz for and on behalf of American Fidelity, which was to be cancelled by American Fidelity in order to reduce the indebtedness of Joseph Lotz to it; and that said defendants further conspired and agreed among themselves and for the benefit of American Fidelity and American Plan that Joseph Lotz would write excessively large amounts of insurance for Mid-States, regardless of the nature of the risks involved and at high advance premiums to sub-agents, so that the defendants would be enabled to divert to American Fidelity and American Plan such premiums as might be collected by Joseph Lotz on insurance business procured by him for and on behalf of Mid-States.

XVII.

That on or about the 31st day of August, 1951, Joseph Lotz opened a commercial account with Anglo Bank at its office at 1450 Broadway, Oakland, California, entitled "Joe Lotz, Trustee" and thereafter proceeded to endorse and deposit therein various checks made payable to the order of Mid-States, which Joseph Lotz represented and warranted to Anglo Bank he was authorized, and had authority, to endorse on behalf of Mid-States, among which were the following drawn by Public Service Insurance Co. on Pacific National Bank of San Francisco:

Check No.	Date of Check	Amount	Date of Deposit
3590	Sept. 7, 1951	\$ 5,547.25	Sept. 11, 1951
3611	Sept. 14, 1951	67,500.00	Sept. 18, 1951
3628	Sept. 24, 1951	11,250.00	Sept. 25, 1951
3660	Sept. 28, 1951	3,750.00	Oct. 1, 1951
3699	Oct. 15, 1951	5,089.44	Oct. 16, 1951

and among which was the following drawn by George R. Fulmore on Bank of America, National Trust and Savings Association:

Check No.	Date of Check	Amount	Date of Deposit
980	Nov. 16, 1951	\$ 1,484.65	Nov. 20, 1951

and among which were the following drawn by Jackson Motor Sales on the Anglo California National Bank, Chico, California:

Check No.	Date of Check	Amount	Date of Deposit
4868	Oct. 13, 1951	\$ 1,000.00	Oct. 13, 1951
4902	Nov. 10, 1951	800.00	Nov. 15, 1951

and Mid-States in its action against Anglo Bank, referred to hereinafter in Paragraph XIX hereof, has alleged that there may be other checks made

payable to Mid-States which may have been endorsed and deposited by Joseph Lotz with Anglo Bank.

XVIII.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that all of said defendants carried out the plan and conspiracy hereinabove referred to in the following manner:

(a) At the direction and instigation of the defendants other than Joseph Lotz, and by agreement with all of the defendants including Joseph Lotz, Joseph Lotz fraudulently concealed from Mid-States and Anglo Bank, (1) that he was insolvent; (2) that he had agreed to divert to American Fidelity and American Plan all funds and premiums held or to be received by him on insurance procured by him for and on behalf of Mid-States; (3) that he had conspired and agreed with the other defendants in the manner aforesaid; (4) that the re-writing of insurance by him on behalf of Mid-States in substitution for insurance previously written by him for American Fidelity was for the sole purpose of enabling American Fidelity to reduce the amount of the otherwise uncollectible indebtedness to it from Joseph Lotz at the expense of Mid-States; (5) that new insurance being written by him for Mid-States would be and was extraordinarily large and excessive in amount on poor risks and with high advance premiums to sub-agents; (6) that he had surrendered to American Fidelity and American Plan, acting through defendants Mark Hart

and Ralph L. Smead, full control and authority over his insurance agency and finances; and (7) that he surrendered and paid over to American Fidelity and American Plan, acting through defendants Mark Hart and Ralph L. Smead, the sums received by him from Public Service Insurance Co., George R. Fulmore and Jackson Motor Sales, pursuant to the checks endorsed and deposited by him, as alleged in Paragraph XVII hereinabove; that all of said defendants in addition to concealing the aforesaid acts for the purpose and intent and with the result of deceiving Mid-States and Anglo Bank so that Mid-States would not terminate Joseph Lotz' agency agreement and would consent to Joseph Lotz rewriting insurance in substitution for insurance previously written by him for American Fidelity and so that Joseph Lotz might continue to endorse and deposit checks made payable to Mid-States with Anglo Bank, affirmatively represented to Mid-States that the reason Joseph Lotz desired and intended to write more insurance for Mid-States and less for American Fidelity, and especially the reason for his rewriting for Mid-States insurance originally written for American Fidelity, was that he had requested American Fidelity to grant him more favorable terms which American Fidelity refused to do;

(b) On or about August 17, 1951, American Fidelity, American Plan, Joseph Lotz and Ralph L. Smead entered into an agreement whereby Ralph L. Smead was appointed the representative of American Fidelity and of American Plan and as

such was given full and complete control and authority over the financial affairs of Joseph Lotz and his insurance agency for the purpose of diverting to American Fidelity and American Plan all funds and premiums held or received by Joseph Lotz on insurance procured by him for and on behalf of Mid-States, and in particular sums to be and which were received by him from Public Service Insurance Co., George R. Fulmore and Jackson Motor Sales, pursuant to checks endorsed and deposited by him, as alleged in Paragraph XVII hereinabove; a true and correct copy of the letter from Mark Hart, as President of American Plan, to Ralph L. Smead, dated August 17, 1951, and a true and correct copy of Memorandum of Agreement among defendants American Fidelity, American Plan, Joseph Lotz and Ralph L. Smead, dated August 22, 1951, are attached hereto, marked Exhibits 1 and 2, respectively;

(c) On or about August 31, 1951, Joseph Lotz opened the aforesaid account with Anglo Bank, and proceeded to endorse and deposit therein checks payable to the order of Mid-States, and did represent and warrant to Anglo Bank that he was authorized and had authority to endorse the same on behalf of Mid-States;

(d) That during the months of September, October and November, 1951, while knowing that they were funds and premiums held or received by Joseph Lotz on insurance procured by him for and on behalf of Mid-States, diverted to and for the benefit of American Fidelity and American Plan

such of the funds received by Joseph Lotz from Public Service Insurance Co., George R. Fulmore and Jackson Motor Sales, and from such others, if any, because of checks made payable to Mid-States which may have been endorsed and deposited by Joseph Lotz with Anglo Bank, as referred to in Paragraph XVII hereof, which were not paid to or for the benefit of Mid-States;

(e) By November 1, 1951, by virtue of the diversion to American Fidelity and American Plan of funds and premiums held or received by Joseph Lotz on insurance procured by him for and on behalf of Mid-States and their application in reduction of the indebtedness of Joseph Lotz to American Fidelity, such indebtedness had been reduced to the sum of approximately \$61,016.00; on or about said date the defendants, acting through Joseph Lotz and Ralph L. Smead, caused insurance having a premium value of approximately \$61,016.00, which had originally been written by Joseph Lotz for American Fidelity and in respect of which the assureds thereunder had already paid the premiums, to be rewritten by Joseph Lotz for Mid-States.

XIX.

On the 28th day of February, 1952, Mid-States commenced an action in this court entitled "Mid-States Insurance Company, a corporation, Plaintiff, vs. The Anglo California National Bank of San Francisco, a national banking association, Defendant" and numbered 31311 on the records and files of this court, alleging therein that while Joseph

Lotz had authority to receive the checks referred to and specified in Paragraph XVII hereof, he had no authority to endorse them for Mid-States, and prays for a judgment of this court against Anglo Bank for the amount thereof, to-wit: \$99,021.10, with interest thereon at the rate of seven per cent (7%) per annum, and costs of suit incurred therein.

XX.

That at the times the said checks referred to in Paragraph XVII hereof were endorsed and deposited by Joseph Lotz, as aforesaid, Anglo Bank believed that he was authorized and had authority to endorse and deposit the same, and it was not until on or about the 10th day of January, 1952, that Anglo Bank was advised and informed by Mid-States that Joseph Lotz had no authority to endorse checks made payable to Mid-States; during the latter part of March, 1952, Anglo Bank for the first time was advised and informed of the aforesaid plan and conspiracy of defendants to defraud and deceive, and of the various acts done pursuant thereto, and until such time Anglo Bank had no knowledge, information or belief concerning the same; that at all of the times herein mentioned the defendants knew that Joseph Lotz was insolvent and unable to meet his obligations.

XXI.

That on the 28th day of April, 1952, Mid-States commenced an action in this court entitled "Mid-States Insurance Company, a corporation, Plaintiff, vs. American Fidelity and Casualty Company, Inc.,

a corporation; the American Plan Corporation, a corporation; Mark Hart; Joseph Lotz; Ralph L. Smead; L. Sudekum; John Will; First Doe; Second Doe; Third Doe; Fourth Doe; Fifth Doe, and Sixth Doe, Defendants'' numbered 31496 on the records and files of this court, and entitled "Complaint for Fraud," alleging therein the aforementioned plan and conspiracy of the defendants to defraud and deceive, and the various acts done pursuant thereto, and praying for a judgment of this court against defendants for the sum of \$297,097.91, and the further sum of \$50,000.00 as and for exemplary and punitive damages, and for costs of suit incurred therein.

XXII.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that there is included within and as a part of the aforesaid claim of Mid-States against defendants for \$297,097.91, as set forth in its said action numbered 31496 on the records and files of this court, the claim of Mid-States against Anglo Bank in the sum of \$99,021.10, as set forth in its said action numbered 31311 on the records and files of this court.

XXIII.

That should Mid-States prevail in its said action numbered 31311 on the records and files of this court and recover judgment against Anglo Bank, Anglo Bank will, as a result of the aforesaid plan and conspiracy of the defendants to defraud and deceive and the various acts done, permitted, di-

rected and suffered by the defendants pursuant thereto, be damaged to the extent of such sum as may be awarded Mid-States in connection with the checks described in Paragraph XVII hereof and because of the endorsement and use of the funds therefrom, as herein alleged.

XXIV.

In doing and permitting the things herein alleged defendants have been guilty of fraud and deceit and have been actuated by malice towards Anglo Bank, and by reason thereof Anglo Bank demands exemplary and punitive damages against defendants in the sum of \$15,000.00.

Wherefore, Anglo Bank prays judgment against defendants, and each of them, for all sums that may be adjudged against Anglo Bank in favor of Mid-States; and for the sum of \$15,000.00 as exemplary and punitive damages; and for its costs of suit incurred herein, and for such other and further relief as may be meet and proper in the premises.

SEVERSON & McCALLUM,
ALMON B. McCALLUM,

/s/ By ALMON McCALLUM
WORTHINGTON, PARK &
WORTHINGTON

/s/ By W. F. WORTHINGTON,
Attorneys for Plaintiff in
Intervention.

Duly Verified.

[Endorsed]: Filed October 1, 1952.

[Title of District Court and Cause 31311.]

THIRD PARTY COMPLAINT

Comes Now, The Anglo California National Bank of San Francisco, a national banking association, defendant and third-party plaintiff, and for a cause of action against third-party defendants above named, and each of them, alleges as follows, to-wit:

I.

That at all times herein mentioned The Anglo California National Bank of San Francisco (hereinafter called "Anglo Bank"), defendant and third-party plaintiff, was and now is a national banking association organized and existing under the laws of the United States of America and authorized to transact, and transacting, a general banking business in the State of California, with its principal place of business in the City and County of San Francisco, State of California.

II.

That at all times herein mentioned Mid-States Insurance Company (hereinafter called "Mid-States"), plaintiff above named, was and now is a corporation organized and existing under the laws of the State of Illinois. * * * * *

[Note: The balance of the Third Party Complaint is similar to the Complaint in Intervention in Case No. 31496 set out at pages 51-64 of this printed record.]

[Endorsed]: Filed October 1, 1952.

[Title of District Court and Cause 31311.]

ANSWER OF THIRD PARTY DEFENDANTS
AMERICAN FIDELITY AND CASUALTY
COMPANY, INC., a corporation, and THE
AMERICAN PLAN CORPORATION, a cor-
poration, to THIRD PARTY COMPLAINT

Come Now Third Party Defendants American Fidelity and Casualty Company, Inc., a corporation (hereinafter called "American Fidelity"), and The American Plan Corporation, a corporation (hereinafter called "American Plan"), referred to hereinafter as "Third Party Defendants", and in answer to the Third Party Complaint herein, admit, deny and allege as follows:

I.

Answering the allegations of paragraph I, Third Party Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

* * * * *

[Note: Paragraphs II to XXIV, incl., of the Answer is the same as Answer of Defendants American Fidelity and Casualty Company and The American Plan Company to Complaint in Intervention set out at pages 82-88 of this printed record.]

As and for a Separate and Further Defense and as Counterclaims herein, Third Party Defendants allege:

XXV.

Third Party Defendants and Third Party Plaintiff have not been and are not in privity and no duty has been or is owed by Third Party Defendants to Third Party Plaintiff. The claim of Third Party Plaintiff against Third Party Defendants is conditioned on a recovery by plaintiff Mid-States Insurance Company against Third Party Plaintiff, and Third Party Plaintiff proceeds in the Third Party Complaint against Third Party Defendants as subrogee of Plaintiff Mid-States Insurance Company. The claim of Third Party Plaintiff, as such subrogee, against Third Party Defendants is subject to all defenses, set-offs and counterclaims which Third Party Defendants have against Mid-States Insurance Company.

In the action filed by Mid-States Insurance Company against Third Party Defendants and others in the above entitled court, bearing No. 31496, which action is referred to in the Third Party Complaint herein, Third Party Defendants have filed an Answer and Counterclaims to the Complaint of Plaintiff Mid-States Insurance Company therein. A copy of said Answer and Counterclaims is attached hereto, marked Exhibit "A" and hereby made a part of this pleading with the same effect as if the same and all the defenses and counterclaims contained in it were fully set forth herein, and Third Party Defendants hereby set up all said defenses and counterclaims herein in opposition to the claim of Third Party Plaintiff as well as to that of Plaintiff Mid-States Insurance Company.

As and for a Separate and Further Defense herein and as and for a defense against Plaintiff Mid-States Insurance Company, Third Party Defendants allege:

XXVI.

Third Party Defendants repeat and allege as if herein fully set forth everything contained in the Answer of The Anglo California Bank of San Francisco to the Complaint of Mid-States Insurance Company herein.

Wherefore Third Party Defendants pray that Third Party Plaintiff take nothing by the Third Party Complaint herein and that Third Party Defendants have judgment against Third Party Plaintiff for their costs of suit and for such other and further relief as to the Court may seem proper in the premises.

Dated: October 3, 1952.

/s/ HAROLD R. McKINNON

/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Third Party Defendants American Fidelity and Casualty Company, Inc. and The American Plan Corporation.

[Exhibit A—Answer of Defendants American Fidelity and Casualty Co. Inc. and The American Plan Corp. to Complaint; and Counterclaims is set out at pages 36-50 of this printed record.]

[Endorsed]: Filed October 9, 1952.

[Title of District Court and Cause 31311.]

ANSWER OF THIRD PARTY DEFENDANT
JOSEPH LOTZ TO THIRD PARTY
COMPLAINT

Now Comes Joseph Lotz, a Third Party Defendant in the above entitled cause, and for separate answer to the Third Party Complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations of Paragraph I, Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

II.

Answering paragraph II, admits the allegations thereof.

III.

Answering paragraph III, admits the allegations thereof.

IV.

Answering paragraph IV, this Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments of said paragraph.

V.

Answering Paragraph V, admits the allegations thereof except this defendant has no knowledge or

information sufficient to form a belief as to the truth of whether Mark Hart is or ever has been President of the American Fidelity.

VI.

Answering paragraph VI, this Third Party Defendant states that he has no knowledge or information to form a belief as to the truth of any of the averments contained in said paragraph.

VII.

Answering paragraph VII, this Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in said paragraph.

VIII.

Answering paragraph VIII, this Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

IX.

Answering paragraph IX, this Third Party Defendant alleges that on or about November 27, 1950, American Fidelity appointed this Third Party Defendant its agent for the State of California, with power to accept proposals for insurance covering such automobile risks as American Fidelity might authorize to be insured, and to charge the premiums for such proposals, and to collect premiums on insurance tendered by this Third Party Defend-

ant to and accepted by American Fidelity, and subject to approval by American Fidelity to adjust losses, and alleges that this Third Party Defendant remained such agent with the powers hereinabove specified until on or about August 21, 1951; denies all the other allegations regarding this Third Party Defendant's agency for American Fidelity.

Admits that at all times mentioned in said Third Party Complaint, he was a resident of the State of California.

X.

Answering paragraph X, admits the allegations thereof.

XI.

Answering paragraph XI, admits the allegations thereof.

XII.

Answering paragraph XII, this Third Party Defendant states that the Mid-States Insurance Company did, on May 15, 1947, appoint this Third Party Defendant its agent for the State of California, but denies that he was at any time formally appointed general agent for said Mid-States; admits all other averments contained in said paragraph.

XIII.

Answering paragraph XIII, alleges that on or about November 27, 1950, American Fidelity appointed Joseph Lotz, this Third Party Defendant, its agent for the State of California with the powers specified in paragraph IX of this Answer, and admits that Lotz as such agent thereafter procured

insurance business for and on behalf of American Fidelity, and alleges that Lotz remained the agent of American Fidelity with the powers specified in paragraph IX of this Answer until on or about August 22, 1951, and except as herein alleged or admitted, denies each and every of the allegations of paragraph XIII.

XIV.

Answering paragraph XIV, this Third Party Defendant alleges that he has no knowledge or information sufficient to form a belief as to the amount of said indebtedness, and as to the insolvency alleged in said paragraph, this defendant denies each and every averment thereof.

XXV.

Answering paragraph XV, denies each and every allegation thereof.

XVI.

Answering paragraph XVI, denies each and every allegation thereof.

XVII.

Answering paragraph XVII, this Third Party Defendant admits he had authority to endorse and deposit various checks made payable to the order of Mid-States, but that as to the amount, number and date thereof, he is without sufficient knowledge or information to form a belief as to the truth of the averments thereof.

XVIII.

Answering paragraph XVIII, this Third Party

Defendant denies each and every allegation contained in subparagraph (a) thereof;

With respect to the allegations of sub-paragraph (b), admits the execution of the letter Exhibit 1 to the Third Party Complaint and the agreement Exhibit 2 thereof, and in that respect alleges that both said letter and agreement were executed on the same date, namely on or about August 22, 1951, and that the date August 17, 1951, on the letter Exhibit 1 was due to an error, and except as herein admitted and alleged, denies each and every of said allegations;

With respect to the allegations of sub-paragraph (c), admits the allegations therein contained;

With respect to the allegations of sub-paragraph (d), denies each and every allegation therein contained;

With respect to the allegations of sub-paragraph (e), alleges that on or about November 1, 1951, American Plan and plaintiff entered into an agreement under the terms of which certain automobile insurance policies, carrying the aggregate unexpired premiums of approximately \$61,016.00, which policies had been written by American Fidelity through Joseph Lotz, this Third Party Defendant, as its agent, were to be cancelled forthwith and said policies were to be rewritten at once by plaintiff; and except as herein alleged, denies each and every of said allegations; and

Further answering paragraph XVIII, denies that the plan or conspiracy therein referred to or any

such plan or conspiracy ever existed or was carried out.

XIX.

Answering paragraph XIX, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XX.

Answering paragraph XX, denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy, and except as thus denied, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

XXI.

Answering paragraph XXI, admits the allegations thereof, except denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXII.

Answering paragraph XXII, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XXIII.

Answering paragraph XXIII, denies each and every of the allegations thereof, and further denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXIV.

Answering paragraph XXIV, denies each and every of the allegations thereof, and especially denies that Third Party Plaintiff has been damaged in the sum of \$15,000.00, or in any amount at all.

Wherefore, this Third Party Defendant prays that the Third Party Plaintiff take nothing by the Third Party Complaint herein, and that this Third Party Defendant have judgment against Third Party Plaintiff for his costs of suit and for such other and further relief as to the Court may be meet and proper in the premises.

Dated this 20th day of December, 1952.

/s/ BYRON L. DUSKY,

Attorney for Third Party Defendant Joseph Lotz.

Duly Verified.

[Endorsed]: Filed December 23, 1952.

[Title of District Court and Cause 31311.]

ANSWER OF THIRD PARTY DEFENDANT
RALPH L. SMEAD TO THIRD PARTY
COMPLAINT

Now Comes Ralph L. Smead, a Third Party Defendant in the above entitled cause, and for separate answer to the Third Party Complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations of paragraph I, Third

Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

II.

Answering paragraph II, admits the allegations thereof.

III.

Answering paragraph III, admits the allegations thereof.

IV.

Answering paragraph IV, admits the allegations thereof, except denies that American Plan is or was the manager of any of the business of American Fidelity except its United States automobile physical damage business.

V.

Answering paragraph V, admits the allegations thereof, except denies that Mark Hart is or ever has been president of American Fidelity.

VI.

Answering paragraph VI, admits the allegations thereof, except denies that L. Sudekum was or is a resident of New York.

VII.

Answering paragraph VII, admits the allegations thereof, except this defendant has no knowledge or information sufficient to form a belief as to the residence of the said John Will.

VIII.

Answering paragraph VIII, states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

IX.

Answering paragraph IX, alleges that on or about November 27, 1950, American Fidelity appointed Joseph Lotz its agent for the State of California with power to accept proposals for insurance covering such automobile risks as American Fidelity might authorize to be insured, and to charge the premiums for such proposals, and to collect premiums on insurance tendered by Lotz to and accepted by American Fidelity, and subject to approval by American Fidelity to adjust losses, and alleges that Lotz remained such agent with the powers hereinabove specified until on or about August 21, 1951; denies all the other allegations regarding Lotz's agency for American Fidelity.

As to the other allegations contained in Paragraph IX, this Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth thereof.

X.

Answering Paragraph X, this Third Party Defendant admits that he was and now is a resident of the State of California, and that he was an employee of the defendant, Joseph Lotz and of the American Plan, but not at the time stated in said

Third Party Complaint; denies he was ever at any time an employee of the American Fidelity.

XI.

Answering paragraph XI, admits the allegations thereof.

XII.

Answering paragraph XII, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XIII.

Answering paragraph XIII, alleges that on or about November 27, 1950, American Fidelity appointed Joseph Lotz its agent for the State of California with the powers specified in paragraph IX of this Answer, and admits that Lotz as such agent thereafter procured insurance business for and on behalf of American Fidelity, and alleges that Lotz remained the agent of American Fidelity with the powers specified in paragraph IX of this Answer until on or about August 22, 1951, and except as herein alleged or admitted, denies each and every of the allegations of paragraph XIII.

XIV.

Answering paragraph XIV, this defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth thereof.

XV.

Answering paragraph XV, denies each and every allegation thereof.

XVI.

Answering paragraph XVI, denies each and every allegation thereof.

XVII.

Answering paragraph XVII, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XVIII.

With respect to the allegations of sub-paragraph (a), denies each and every allegation therein contained;

With respect to the allegations of sub-paragraph (b), admits the execution of the letter Exhibit 1 to the Third Party Complaint and the agreement Exhibit 2 thereof, and in that respect alleges that both said letter and agreement were executed on the same date, namely on or about August 22, 1951, and that the date August 17, 1951, on the letter Exhibit 1 was due to an error, and except as herein admitted and alleged, denies each and every of said allegations;

With respect to the allegations of sub-paragraph (c), states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof;

With respect to the allegations of sub-paragraph (d), denies each and every allegation therein contained;

With respect to the allegations of sub-paragraph (e), alleges that on or about November 1, 1951, American Plan and plaintiff entered into an agree-

ment under the terms of which certain automobile insurance policies, carrying the aggregate unexpired premiums of approximately \$61,016.00, which policies had been written by American Fidelity through Joseph Lotz as its agent, were to be cancelled forthwith and said policies were to be rewritten at once by plaintiff; and except as herein alleged, denies each and every of said allegations; and

Further answering paragraph XVIII, denies that the plan or conspiracy therein referred to or any such plan or conspiracy ever existed or was carried out.

XIX.

Answering paragraph XIX, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XX.

Answering paragraph XX, denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy, and except as thus denied, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

XXI.

Answering paragraph XXI, admits the allegations thereof, except denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXII.

Answering paragraph XXII, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XXIII.

Answering paragraph XXIII, denies each and every of the allegations thereof, and further denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXIV.

Answering paragraph XXIV, denies each and every of the allegations thereof, and especially denies that Third Party Plaintiff has been damaged in the sum of \$15,000.00, or in any amount at all.

Wherefore, this Third Party Defendant prays that the Third Party Plaintiff take nothing by the Third Party Complaint herein, and that this Third Party Defendant have judgment against Third Party Plaintiff for his costs of suit and for such other and further relief as to the Court may be meet and proper in the premises.

Dated: This 20th day of December, 1952.

/s/ BYRON L. DUSKY,

Attorney for Third Party Defendant
Ralph L. Smead.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 23, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS AMERICAN
FIDELITY AND CASUALTY COMPANY,
INC., a corporation, and THE AMERICAN
PLAN CORPORATION, a corporation, to
COMPLAINT IN INTERVENTION

Come Now the Defendants American Fidelity and Casualty Company, Inc., a corporation (hereinafter called "American Fidelity"), and The American Plan Corporation, a corporation (hereinafter called "American Plan"), referred to hereinafter as "Defendants", and in answer to the Complaint in Intervention herein, admit, deny and allege as follows:

I.

Answering the allegations of paragraph I, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

II.

Answering paragraph II, admit the allegations thereof.

III.

Answering paragraph III, admit the allegations thereof.

IV.

Answering paragraph IV, admits the allegations thereof, except deny that American Plan is or was the manager of any of the business of American Fidelity except its United States automobile physical damage business.

V.

Answering paragraph V, admit the allegations thereof, except deny that Mark Hart is or ever has been president of American Fidelity.

VI.

Answering paragraph VI, admit the allegations thereof, except deny that L. Sudakum was or is a resident of New York.

VII.

Answering Paragraph VII, admit the allegations thereof, except deny that H. Arthur Will (referred to as "John Will") was or is a resident of New York.

VIII.

Answering paragraph VIII, state they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

IX.

Answering paragraph IX, allege that on or about November 27, 1950, American Fidelity appointed Joseph Lotz its agent for the State of California with power to accept proposals for insurance covering such automobile risks as American Fidelity might authorize to be insured, and to charge the premiums for such proposals, and to collect premiums on insurance tendered by Lotz to and accepted by American Fidelity, and subject to approval by American Fidelity to adjust losses, and allege that Lotz remained such agent with the powers hereinabove specified until on or about August 21, 1951.

deny all the other allegations regarding Lotz's agency for American Fidelity.

As to the other allegations contained in paragraph IX, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth thereof.

X.

Answering paragraph X, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments that Ralph L. Smead was and is a resident of the State of California and an employee of Joseph Lotz, or of any of said averments; admit that Smead now is, and since January 22, 1952, has been an employee of American Plan, and except as so admitted or denied, deny each and every of the allegations of paragraph X.

XI.

Answering paragraph XI, admit the allegations thereof.

XII.

Answering paragraph XII, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XIII.

Answering paragraph XIII, allege that on or about November 27, 1950 American Fidelity appointed Joseph Lotz its agent for the State of California with the powers specified in paragraph IX of this Answer, and admit that Lotz as such agent thereafter procured insurance business for and on

behalf of American Fidelity, and allege that Lotz remained the agent of American Fidelity with the powers specified in paragraph IX of this Answer until on or about August 22, 1951, and except as herein alleged or admitted deny each and every of the allegations of Paragraph XIII.

XIV.

Answering paragraph XIV, allege that on or about August 1, 1951 Joseph Lotz was indebted to American Fidelity in the sum of approximately \$205,111.95 rather than \$190,984.00. Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of the allegation that Lotz was insolvent on or about August 1, 1951, or at any other date. Except as so alleged and denied, deny each and every of the allegations of paragraph XIV, and further specifically deny that Defendants have known at all times or at any time that Lotz was insolvent.

XV.

Answering paragraph XV, deny each and every allegation thereof.

XVI.

Answering paragraph XVI, deny each and every allegation thereof.

XVII.

Answering paragraph XVII, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XVIII.

Answering the allegations of paragraph XVIII:

With respect to the allegations of sub-paragraph (a), deny each and every allegation therein contained;

With respect to the allegations of sub-paragraph (b), admit the execution of the letter Exhibit 1 to the Complaint in Intervention and the agreement Exhibit 2 thereto, and in that respect allege that both said letter and agreement were executed on the same date, namely on or about August 22, 1951, and that the date August 17, 1951 on the letter Exhibit 1 was due to an error, and except as herein admitted and alleged deny each and every of said allegations;

With respect to the allegations of sub-paragraph (c), state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof;

With respect to the allegations of sub-paragraph (d), deny each and every allegation therein contained;

With respect to the allegations of sub-paragraph (e), allege that on or about November 1, 1951, American Plan and plaintiff entered into an agreement under the terms of which certain automobile insurance policies, carrying the aggregate unexpired premiums of approximately \$61,016.00, which policies had been written by American Fidelity through Joseph Lotz as its agent, were to be cancelled forthwith and said policies were to be rewritten at once by plaintiff; and except as herein al-

leged, deny each and every of said allegations; and

Further answering paragraph XVIII, deny that the plan or conspiracy therein referred to or any such plan or conspiracy ever existed or was carried out.

XIX.

Answering paragraph XIX, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XX.

Answering paragraph XX, deny the existence of any such plan or conspiracy or any acts done pursuant to conspiracy, and except as thus denied state that they have no knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

XXI.

Answering paragraph XXI, admit the allegations thereof, except deny the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXII.

Answering paragraph XXII, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XXIII.

Answering paragraph XXIII, deny each and every of the allegations thereof, and further deny the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXIV.

Answering paragraph XXIV, deny each and every of the allegations thereof, and especially deny that Plaintiff in Intervention has been damaged in the sum of \$15,000.00 or in any sum at all.

As and for a Separate and Further Defense Defendants allege:

XXV.

Defendants and Plaintiff in Intervention have not been and are not in privity and no duty has been or is owed by Defendants to Plaintiff in Intervention. The claim of Plaintiff in Intervention against Defendants is conditioned on a recovery by Plaintiff Mid-States Insurance Company against Plaintiff in Intervention in another action as alleged in the Complaint in Intervention, and Plaintiff in Intervention proceeds in its Complaint in Intervention against Defendants as subrogee of Plaintiff Mid-State Insurance Company. The claim of Plaintiff in Intervention, as subrogee, against Defendants is subject to all defenses, set-offs, and counter-claims which Defendants have against Plaintiff Mid-States Insurance Company. In Defendants' Answer and Counter-claims to the Complaint of Plaintiff Mid-States Insurance Company herein, Defendants set up various defenses and counter-claims against the claim of Plaintiff Mid-States Insurance Company. Defendants hereby incorporate and make a part of this pleading all of the contents of said Answer and Counter-claims to the Complaint of Plaintiff Mid-States

Insurance Company and hereby set up all the defenses and counter-claims contained in said pleading in opposition to the claim of Plaintiff in Intervention herein as well as to the claim of Plaintiff Mid-States Insurance Company, with the same effect as if said Answer and Counter-claims and all the defenses and counter-claims contained in it were fully set forth herein.

As and for a Separate and Further Defense Defendants allege:

XXVI.

The Complaint in Intervention fails to state a claim against Defendants upon which relief can be granted.

Wherefore, Defendants pray that Plaintiff in Intervention take nothing by the Complaint in Intervention herein and that Defendants have judgment against Plaintiff in Intervention for their costs of suit and for such other and further relief as to the Court may seem proper in the premises.

Dated: This 30th day of December, 1952.

/s/ HAROLD R. McKINNON,

/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Defendants American Fidelity and Casualty Company, Inc., and The American Plan Corporation.

[Endorsed]: Filed December 31, 1952.

[Title of District Court and Cause 31311.]

AMENDMENT TO ANSWER OF THIRD
PARTY DEFENDANTS American Fidelity
and Casualty Company, Inc., a corporation,
and The American Plan Corporation, a cor-
poration, to Third Party Complaint

Come Now Third Party Defendants American Fidelity and Casualty Company, Inc., a corporation, and The American Plan Corporation, a corporation, and by written consent of Plaintiff and of Third Party Plaintiff herein, amend their Answer to the Third Party Complaint herein as follows:

By striking out of said Answer the Separate and Further Defense therein beginning with the words "As And For" in line 20, page 7 of said Answer and ending with the words "Insurance Company herein", in line 27, page 7 of said Answer.

Dated: March 18, 1953.

/s/ HAROLD R. McKINNON,

/s/ BRONSON, BRONSON &

McKINNON,

Attorneys for Third Party, Defendants, American Fidelity and Casualty Company, Inc., and The American Plan Corporation

CONSENT TO AMENDMENT TO ANSWER

We consent to the foregoing Amendment to Answer.

Dated: March 18, 1953.

/s/ MAYNARD GARRISON,

/s/ JOHN R. PASCOE,

/s/ JOSEPH MARTIN, JR.,

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff

/s/ SEVERSON & McCALLUM,

/s/ ALMON McCALLUM,

Attorneys for Defendant and Third
Party Plaintiff

[Endorsed]: Filed March 25, 1953.

[Title of District Court and Cause 31311.]

AMENDMENT TO ANSWER

Comes Now, the Defendant The Anglo California National Bank of San Francisco, a national banking association, and amending its Answer to the Complaint of Plaintiff on file herein by adding thereto a Ninth Affirmative Defense and First Counter-Claim avers as follows, to-wit:

I.

Realleges all of the allegations, issues, defenses, matters and things alleged and set forth in its Answer to the Complaint of Plaintiff heretofore and

on the 5th day of May, 1952, filed in the above-entitled cause as though herein set forth in full.

Ninth Affirmative Defense

As a Further, Separate and Ninth Affirmative Defense to the Complaint of Plaintiff on File Herein, Defendant Avers as Follows, to-wit:

I.

That it is the custom and usage both locally in the State of California and generally throughout the United States for (1) agents authorized to collect, receive and receipt for money owing to their principals where the debtors of such principals are removed from such principals and are in close proximity to said agents and the payments being made are for business transacted by such principals through such agents; and (2) for general agents of insurance companies authorized to collect, receive and receipt for premiums for insurance generally and for automobile physical damage insurance in particular to endorse and deposit checks delivered to such agents as and for payment of premiums on insurance or otherwise and made payable to the order of such agent's principals in the manner and as the checks referred to in the Complaint of Plaintiff on file herein were endorsed by Joe Lotz as the general agent of Plaintiff; and at all of the times alleged and upon each of the occasions referred to in the Complaint of Plaintiff on file herein such custom and usage as aforesaid was known to Plaintiff and such custom and usage as aforesaid was so

widely known and practiced that Plaintiff should have known thereof.

First Counterclaim

As and for a Separate and Further Defense to the Complaint of Plaintiff on File Herein and as and for a First Counterclaim, Defendant Alleges as Follows, to-wit:

I.

That since the commencement of this action Plaintiff above-named has commenced a separate action entitled, "Mid-States Insurance Company, a corporation, Plaintiff, vs. American Fidelity and Casualty Company, Inc., a corporation; The American Plan Corporation, a corporation; Mark Hart; Joseph Lotz; Ralph L. Smead; L. Sudekum; John Will; First Doe; Second Doe; Third Doe; Fourth Doe; Fifth Doe; and Sixth Doe, Defendants" and numbered 31496 on the records and files of this Court and entitled "Complaint for Fraud". In such other action this Defendant is not named as a Defendant and Plaintiff alleges therein that the Defendants named therein conceived, prepared and carried out a plan to and did acquire and divert to their use funds which this Plaintiff claims were its funds and praying judgment for the recovery thereof in the amount of \$297,097.91.

II.

That the sum of \$99,021.10 for which Plaintiff prays judgment against the Defendant in this ac-

tion is a part of and included in the aforesaid sum of \$297,097.91 and a part of the funds which Plaintiff alleges were acquired by and diverted to the use of the Defendants named in the said action numbered 31496 on the records and files of this Court.

III.

That upon payment of any sum to Plaintiff herein by the Defendants named in the aforesaid action numbered 31496 in satisfaction of any judgment against the said Defendants, or any of them, named in said action numbered 31496, or of the claims and demands therein made by Plaintiff by way of settlement by the said Defendants, or any of them, named in said action numbered 31496, Plaintiff to the extent of such payment or payments will be compensated for the loss or damage complained of and will have received payment of the sums sought in the above-entitled action.

Wherefore, Defendant prays that Plaintiff take nothing by its Complaint on file herein and that Defendant have judgment against the Plaintiff for its costs of suit incurred herein and for such other and further relief as to the Court may seem meet and proper in the premises; including but not limited to a judgment of this Court against Plaintiff and in favor of Defendant decreeing that Defendant shall be and is entitled to have credit against or reimbursement for, as the case may be, any sums, if any be found due from this Defendant to Plaintiff to the extent of the amount Plaintiff shall

recover or receive from the Defendants, or any of them, named in the action numbered 31496 on the records and files of this Court.

SEVERSON, McCALLUM & DAVIS

/s/ By ALMON McCALLUM

WORTHINGTON, PARK &

WORTHINGTON

/s/ By W. F. WORTHINGTON

CONSENT TO AMENDMENT TO ANSWER

We consent to the foregoing Amendment to Answer.

Dated: April 8, 1953.

/s/ MAYNARD GARRISON

/s/ JOHN R. PASCOE

/s/ JOSEPH MARTIN, JR.

WALLACE, GARRISON, NORTON

& RAY,

Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 16, 1953.

[Title of District Court and Cause 31311.]

AMENDMENT TO COMPLAINT

Comes now plaintiff, Mid-States Insurance Company, a corporation, and amends its Complaint on file herein by deleting therefrom the words "authority to receive, but" in paragraph II of said Complaint on line 10 of page 2 thereof.

Dated: May 6, 1953.

/s/ MAYNARD GARRISON

/s/ JOHN R. PASCOE

/s/ JOSEPH MARTIN, JR.

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff.

CONSENT TO AMENDMENT TO COMPLAINT

We consent to the filing of the foregoing Amendment to Complaint.

Dated: May . . . , 1953.

SEVERSON, McCALLUM & DAVIS

/s/ By ALMON McCALLUM,

Attorneys for Defendant.

[Endorsed]: Filed May 7, 1953.

[Title of District Court and Cause No. 31496.]

OPINION

Roche, Chief Judge:

This is an action brought by Mid-States Insurance Company, hereafter called Mid-States, against (1) American Fidelity and Casualty Company, hereafter called American Fidelity, (2) its manager, the American Plan Corporation, and (3) certain agents and officers of these aforementioned defendants.

Plaintiff's complaint charges that the defendants conspired to defraud Mid-States, and that this conspiracy was actually carried out in breach of Lotz's (agent for Mid-States) fiduciary obligations to the Company. The prayer of the complaint is for \$297,097.91 and for \$50,000.00 as exemplary and punitive damages.

Counterclaims were interposed by some of the defendants, but little or no evidentiary proof supporting the allegations contained therein was offered at the time of the trial of this case.

The Anglo California National Bank (hereafter called Anglo) has by permission of the court filed a complaint in intervention in this action, and appears as a third party plaintiff. During the period of the conspiracy alleged in the Mid-States' complaint, the defendant Lotz endorsed and deposited in his account certain checks which were delivered to him, but which were drawn to the order of Mid-States. Mid-States in a separate action sued Anglo

on the theory that Lotz was not authorized to endorse checks payable to Mid-States, and this suit was settled after trial by payment of \$37,500.00 from Anglo to Mid-States.

Anglo, seeking recovery of this amount from the defendants, alleges that the endorsement of checks by Lotz was an act in furtherance of the fraudulent conspiracy upon which the principal action is based. As an alternative theory, Anglo claims recovery by way of subrogation should Mid-States recover in the principal action. Either theory of recovery depends on the showing of a fraudulent conspiracy on the part of the defendants.

The facts of the case are as follows: Both Mid-States and American Fidelity are insurance companies writing automobile collision insurance. In May, 1947, Mid-States appointed Lotz its general agent for the State of California, and thereafter Lotz procured substantial amounts of insurance business for Mid-States.

In November, 1950, American Fidelity also appointed Lotz as its general agent for this state. As the terms of his agency contract with that company were more favorable to him than those of his contract with Mid-States, Lotz thereafter placed the bulk of his business with American Fidelity. By August, 1951, some nine months later plaintiff's complaint alleges that Lotz was indebted to American Fidelity in the sum of approximately \$190,984.00. As Lotz had sharply curtailed his writings in Mid-States his total indebtedness to that company at that time totaled approximately \$30,000.00.

In the middle of this same month, August, 1951, Lotz and his office manager, Smead went to New York at the request of Mark Hart, president of American Fidelity. Hart had become concerned over the financial condition of the Lotz agency; a concern which was natural since a substantial check given by Lotz had been returned by the bank unpaid, and there was a large outstanding account which was delinquent. The evidence is conflicting as to exactly what was said and done at this meeting held in Hart's New York offices.

Mid-States contends it was at this meeting that Lotz and Smead disclosed their insolvency, and that the suggestion was made that another insurer be found which would accept Lotz's new policy writing from which premium monies could be obtained to pay off American Fidelity's defaulted account.

There is no dispute, however, that defendant American Fidelity directed that Lotz make prompt collection of his receivables, that immediately after the meeting Lotz proceeded to Chicago and was successful in negotiating a new and more favorable agency contract with Mid-States upon his assurance of giving them an increased volume of business, and that Smead returned to Oakland to make collections from sub-agents.

About a week after the New York meeting, August 20, 1951, Hart and Feller (General Counsel of American Plan) flew to Oakland for further conferences with Lotz and Smead. On August 22, 1951 during this visit defendants executed a written contract which provided (1) that Lotz's agency for

Fidelity and Casualty was terminated, (2) that the time allowed for payment of Lotz's total indebtedness was shortened so that payment would be completed by September 15, 1951,¹ and (3) that Lotz's financial control of the business was taken from him, and Smead was to act as representative of American Plan with authority over the financial end of Lotz's agency.

As a result of various transactions between the months of August and November, 1951, Lotz's indebtedness to American Fidelity was completely liquidated and his indebtedness to Mid-States increased substantially.

On November 24, 1951, officers of Mid-States traveled to Oakland and had several conversations with Lotz dealing with his financial condition. Lotz told the officials of Mid-States that he was in the red, and that this condition was due to high operating costs and high commissions paid to sub-agents. On November 27, 1951, Lotz submitted a letter to these officials telling them how he intended to operate his agency from that date on, and setting forth the various plans he intended to put into operation in order to stay in business and pay his indebtedness. The evidence discloses that on November 27, 1951 Lotz also gave Mid-States both a power of attorney and an assignment of his business.

Mid-States alleges that it was not until Decem-

¹ Lotz had a 75 day credit period with American Fidelity.

ber 4, 1951 that they learned all of the facts from Lotz concerning the alleged conspiracy to defraud, and that thereafter it sought to reduce its loss. The indebtedness was reduced to the sum of \$281,746.96, and it is this sum which plaintiff wishes to recover.

Anglo and Mid-States allege that the fraudulent conspiracy contemplated at least four separate activities, (1) the diverting to American Fidelity of premium funds received by Lotz for the account of Mid-States, (2) the cancelling by Lotz of policies in American Fidelity and the re-writing of these policies in Mid-States at a time when American Fidelity knew that Lotz was insolvent, (3) the writing of vastly increased amounts of insurance in Mid-States by Lotz without regard to the quality of the risks involved, and (4) the concealing from Anglo Bank and Mid-States of Lotz's insolvency and his inability to pay he indebtedness as it fell due.

In order to better understand this case it is essential to indicate the course of dealing between the parties.

The insurance policies of both Mid-States and American Fidelity were being written under what is known generally as a "retrospective plan." Under this plan, Lotz as general agent appointed sub-agents who were entitled to an immediate commission upon the premiums collected by them. The sub-agents forwarded reporting copies thereof to the company concerned. Lotz then became indebted to the company for the entire amount of the premium although he had a so-called credit period

within which to pay it. Lotz was not entitled to receive at any time any commission for himself or for any sub-agent but received his commission after the policy had expired, his commission being dependent upon the losses occurring under the policy. At the expiration of Lotz's credit period he was required to remit the entire premium to the company, which would pay losses from it together with its so-called "retention" and would at the expiration of the policy return any balance to Lotz as his commission.²

The original agency agreement between Lotz and Mid-States (May 15, 1947) contained no references to trust. The new agreement entered into September, 1951 provided in part:

* * * All premiums received by the Agent shall be held by such Agent as trustee for the Company.

² As an example of this method of operation:

Assume that a sub-agent collected.....	\$100.00
Assuming 25% commission retained by sub-agent.....	25.00
<hr/>	
Forwarded to Lotz by sub-agent.....	\$ 75.00
Time within which Lotz had to pay company, assume 65-75 days. End of 65-75 day period full payment to company	\$100.00
Retention of company for handling business, assume....	15.00
<hr/>	
Balance to pay losses and Lotz's commission.....	\$ 85.00
Net commission to Lotz where no losses.....	\$ 85.00
Less sub-agent's commission	25.00
<hr/>	
	\$ 60.00

If there were any losses, Lotz's ultimate commission would be proportionately less.

* * * The keeping of an account with the agent on the company's books, as a creditor and debtor account, is declared a record memorandum of business transacted, and neither such keeping of account, nor alteration in compensation rate nor failure to enforce prompt remittance or compromise or settlement or declaration of balance of account, shall be held to waive the understanding that the premiums collected by the agent are trust funds. * * *

It is a general rule of insurance law that an insurance agent is ordinarily a trustee as to premiums collected, however the way in which Lotz dealt with Mid-States' premiums was habitually inconsistent with a trust.

The evidence discloses that Lotz's agency was a retrospective one, i.e., he could not take his commissions out of the premiums he collected, but he had to wait until the premium was earned by the passage of time, and meantime he had to pay his operating expenses, (and later commissions to sub-agents). This required capital, but Lotz himself did not have sufficient working capital to pay all of his operating expenses and sub-agents' commissions. However, he did have a period of credit before Mid-States was to be paid; therefore, he used the company's funds, and Mid-States was fully cognizant of this fact.

Richard Cass, executive of Mid-States when the original Lotz agreement was entered into was asked in his deposition "* * * did the company know he used the money for operating expenses and paying

any subagents?", and he answered: "There was knowledge of such facts, yes."

The evidence discloses that Lotz, back in 1947, before entering into business with Mid-States told Donnelly the official of Mid-States who engaged him that he had no capital, and in answer Donnelly told him "You have got this length of time to pay our bills * * * you are using the company's money. That is the way the deal is set up."

Now, let us consider Lotz's method of handling funds. He kept two accounts. Into the trustee account went premiums received from sub-agents, salvage, and subrogation and transfers from operating account. He drew on the trustee account to pay premiums, to make transfers to operating account, and to pay sub-agents' commissions where not previously deducted. He drew on operating account to pay his operating expenses and his own personal and living expenses. Commissions which he earned went into the operating account when he received them by check, and when they were received by way of credit against the amount he owed a company the credit was made to his trustee account. He put personal borrowings into the operating account and he made transfers back from operating to trustee account. Such dealings were gravely inconsistent with trust.

In fact, receipt of the premiums is not what gave rise to the obligation from Lotz to Mid-States. The company kept no record of Lotz's receipt of premiums, nor were they concerned with that. Rather, a certain number of days after the close

of the month in which business was written, Lotz owed the amount of premiums to the company, regardless of whether he had collected it or not.

As Mr. Hatfield, vice-president of Mid-States testified, Lotz was "an independent contractor" with respect to keeping his own books and his own bank account.

The question posed in determining whether a debtor-creditor relationship now exists is whether the conduct of the parties was so inconsistent with the trust clause in the written contract between them so as to warrant the conclusion that the parties intended to modify the written contract. *Garrison vs. Edward Brown & Sons* (1944) 25 C (2d) 473; 154 P 2d 377. Where as in this case, with the company's knowledge, an agent mingled premium moneys with his own funds and otherwise used them inconsistently with a trust, a debtor-creditor relationship is established rather than trustee beneficiary relationship notwithstanding an agreement to the contrary. *Garrison vs. Edward Brown & Sons*, *supra*; *Twin City Fire Ins. Co. vs. Green* (1949) 176 Fed. (2d) 532; *Horton vs. Eagle Indemnity Ins. Co. (N. H.)* 171 A. 322. A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such. *Downey vs. Humphrey* (1951) 102 CA 2d 323 227 P 2d 484.

From the foregoing it follows that if the funds were not trust funds they belonged to Lotz and he could use them to pay his obligations provided that no fraud or breach of fiduciary obligation was involved.

The burden in this case is on plaintiff to prove that a conspiracy to defraud Mid-States was entered into between the defendants. Plaintiff in presenting arguments to the court stated that this case is primarily a question of fact case, and was not regarded as involving serious questions of law.

Plaintiff's brief is very exhaustive, and cites many cases which deal with fraudulent acts committed by agents and/or debtors participated in by third parties. All of these cases were helpful in formulating the general principles of law applicable to the questions presented to the court. One case which plaintiff particularly stresses is *Machado vs. Katcher* (1951) 108 CA 2d, 1; 237 P 2d 715.

Of great significance in the *Machado* case is the fact that there was testimony that the third party (Lewis) knew that Machado and other creditors could not be paid. Further, a motive for favoring Lewis is indicated by the intimacy between Lewis, Katcher, Sr., and the corporation. For the purpose of distinguishing the instant case, it is the court's view that the defendants were not aware that Lotz's creditors could not be paid. Nor was any motive shown for Lotz to engage in a fraudulent plan, i.e., close relationship to Fidelity and Casualty; dislike of Mid-States. Lotz's sole intention as adduced by the court from the evidence in this case was to pay his debts. and thereby continue in business.

Conflicting evidence was offered concerning the meeting held by the defendants in New York, the alleged birthplace of the fraudulent conspiracy.

Plaintiff charges it was at this meeting that Smead and Lotz first disclosed their insolvency, and that it was there that the suggestion was first made that another insurer be found which would accept Lotz's new business.

The court is of the view that the evidence presented at the trial of this case does not substantiate the allegation that the defendants entered a conspiracy to defraud plaintiff. Fidelity and Casualty asked Lotz for payment, and tried to determine how Lotz intended to pay his indebtedness. Lotz renewed relations with Mid-States and wrote an increased amount of business for this company. Business which Mid-States was anxious to get. The loss ratio on this new business compared favorably with the loss ratio on business Lotz had written for American Fidelity. In fact a great deal of Lotz's prior business with both of these companies had been sub-standard. Hart's testimony rebutted all evidence in the record which attempted to show fraudulent intent on the part of defendants.

It is well to note that Lotz was in the same type of difficulty with Fidelity and Casualty in August, 1951 as he was to find himself with Mid-States in December, 1951. Both companies, as a result of the "retrospective" agency arrangement found Lotz indebted to them in huge sums. In both instances Lotz reacted in the same manner. He directed all his efforts towards saving his agency.

Plaintiff contends that Lotz was hopelessly insolvent in August, 1951, and with that knowledge, as plunging himself into deeper insolvency, pre-

ferring American Fidelity, and dooming Mid-States to a large loss.

This knowledge of Lotz's finances can be arrived at only after assembling and studying the figures since the period within which the alleged fraud took place. Actually, no exact knowledge of the financial status of the agency was known when the defendants carried on the various transactions complained about.

From the testimony of the witnesses the court believes that Lotz always had the intention of remaining in business. Nowhere has it been alleged or proven that Lotz reaped any benefits as a result of the alleged fraudulent conspiracy. It is an incompetent conspirator, indeed, who at the completion of his "fraud" ends up in a worse financial condition than when he started. It is hard to imagine a debtor who for absolutely no gain would allow himself to be subjected to approximately three months of constant pressure and haranguing from a creditor anxious for payment. This is not the conduct of a fraudulent conspirator, but rather of a man attempting, and intending to stay in business.

As a witness Lotz gave the impression of being a very confused and mentally upset person. Lotz was formerly a baseball pitcher, and only as recently as 1947 went into the insurance business on a large scale. It was not with his own capital that he accomplished this, but only by using funds which actually belonged to his creditors, and which he had

in his possession during the "credit period."³ This method of operation was carried on with the knowledge of both Mid-States and Fidelity and Casualty, and is highly significant in determining Lotz's state of mind. The evidence discloses that up until the time that Mid-States took over his agency, Lotz was planning to tighten his management, and reduce operating costs thereby enabling him to meet his bills and eventually put the agency on a more solid footing. This is evident in the fact that as late as November 27, 1951, Lotz developed a plan involving reduction of expenses and other factors designed to render his business more profitable. Moreover, the evidence discloses that Mid-States itself as late as November or early December thought that the situation could be worked out and said that Mid-States would try to help Lotz.

Lotz's testimony threw a great deal of light on his mental processes. Reading Smead's written statements and supplements, Lotz said, "I was very influenced by Ralph's (Smead's) point of view because of my mental condition at that time. I wasn't too much on a good equilibrium basis with this worry and other things, physical condition." It might well be that Lotz was an imprudent, ill-advised business man who did not know very much about the internal operation and problems of his insurance agency, but it cannot be developed from

³ Both companies, competing with each other for a volume of business in this State, offered attractive inducements to Lotz in order to secure his account, i.e., longer credit periods, less retention.

the evidence presented that Lotz had intended to conduct himself fraudulently in trying to save his business.

Plaintiff's brief speaks in generalities of Lotz's duty as an agent of Mid-States to reveal his financial standing and his dealings with other companies. However, the evidence discloses that plaintiff's own conduct was responsible to a great extent for the creation and continuation of those activities which caused plaintiff's losses. Lotz was never held to account as to his financial ability before the time the loss was suffered, and Mid-States did not concern itself with how Lotz kept his books as long as his payments were on time. Lotz was an independent contractor as to the operation of his business. No duty can be spelled out on the part of Lotz to account to Mid-States as long as he and the other defendants did not conspire to defraud Mid-States.

Mid-States had realized in the past that Lotz was not too reliable or experienced a business man. The evidence discloses that in August, 1950, Mr. Titus, president of Mid-States, issued a memo that "Lotz needs to be watched very closely on a day to day basis." In June, 1951, Titus again observed "If we can't get any better representation in California than Joe Lotz, we will never stay out of trouble."

In fact the evidence further discloses that in his dealings with Mid-States Lotz always had been delinquent in his remittances, often from 30 to 60 days, and the record shows letters and telegrams

from Mid-States repeatedly demanding payments that were overdue.

Plaintiff relies to a great extent on statements prepared and signed by Lotz and his office manager Smead. The evidence discloses that before the trial of this case Smead testified under oath on numerous proceedings arising out of the subject matter of this case. Various material inconsistencies were evident in his testimony, and during trial of this case the court interrogated the witness as follows:

The Court: "If I understand you, then, you admit yourself you lied?"

The Witness: "Yes, sir * * *"

In view of this admission of untruthfulness, and the poor impression Smead made as a witness it is possible for the court to give very little credence to his testimony.

Ralph Smead was appointed on August 22, 1951 to act as agent of Fidelity and Casualty in supervising the payment of Lotz's indebtedness to that Company. Fidelity and Casualty wished to have someone in Lotz's agency who could be relied upon. Lotz himself was a sick and disturbed man, and the evidence discloses that he relied very heavily on Smead's abilities. In the absence of a showing of fraudulent intent on the part of the defendants, the act of appointing Smead does not appear overly significant to the decision in this case.

Plaintiff Mid-States cites Lotz's rewrite of a large block of insurance, termed the public service transaction, as an example of the devices used by defendants to effectuate their conspiracy to defraud

Mid-States. The evidence discloses that Mid-States was aware of the transaction except for a few days delay in reporting which was due to secretarial work in typing a large number of reports, and that Mid-States and Lotz carried on correspondence discussing this transaction, Lotz being able to clear up the objections which Mr. Hatfield had to some of the risks involved.

Complaint is also made of a transaction involving another insurance rewrite, a block of insurance policies from American Fidelity to Mid-States, the amount involved being about \$61,000.00. It is alleged by plaintiff that it was induced to enter this transaction by certain alleged misrepresentations made by Hart, President of American Fidelity, to Hatfield, Vice-President of Mid-States.

The evidence discloses that this conversation took place on October 31, 1951. In order to understand the import of Hart's words one must take into consideration that Mid-States was anxious to get all of Lotz's business, and that on September 8, 1951, Lotz had told Mid-States that his agency was no longer sending American Fidelity any business whatsoever.

Taking into consideration the fact that Hart and Hatfield were both experienced business executives in large competing insurance companies it is the court's view that Hatfield did not rely on Hart's representations. Additionally, the court carefully read the conversation between Hart and Hatfield, and gives little weight to the argument that Hart's words were fraudulently intended. The conversa-

tion had must be read with the entire record of the case in mind in order to give the words contained therein their proper perspective and significance.

From a study of the entire record in this case the court concludes that plaintiff has not sustained the burden of proving a conspiracy to defraud between the defendants. The underlying factor which motivated both insurance companies in this case was to secure all the business possible in this State, and it was this anxiety for business which caused a great loss to one of them.

The fundamental basis of plaintiff's case is the written statement of Smead, and Smead's word is impugned by his own admission of untruthfulness. The course of dealing between the parties discloses a method of handling the Lotz agency which was contrary to a trust relationship, and in the absence of a showing of a fraudulent conspiracy on the part of the defendants, plaintiff cannot prevail. Lotz in paying Fidelity and Casualty preferred the creditor who was vigilant and actively pursued collection of its debt.

Anglo Bank, in accord with the above reasoning, has no right of recovery against the defendants as it was stated in the bank's brief that should Mid-States fail to prove a fraudulent conspiracy it too, would be precluded from recovery.

In accordance with the foregoing

It Is Ordered that judgment be entered herein upon findings of fact and conclusions of law as follows: That plaintiff Mid-States Insurance Com-

pany take nothing by its complaint against the defendants, that Anglo Bank, plaintiff in intervention take nothing by way of its complaint against the defendants, and that defendants Peter Lotz, American Fidelity and American Plan take nothing by way of their counter-claims. The respective parties to pay their own costs.

Dated: October 11th, 1954.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

[Endorsed]: Filed October 11, 1954.

[Title of District Court and Causes 31311-31496.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause numbered 31496 and the issues raised by the Third Party Complaint in cause numbered 31311 came on regularly for trial on a consolidated basis, and the Court having duly considered the evidence and being fully advised in the premises now makes the following findings of fact:

Findings of Fact

I.

Plaintiff Mid-States (below called Mid-States) is, and at all times referred to herein was, an insurance corporation organized under the laws of the State of Illinois.

Plaintiff in intervention The Anglo California

National Bank of San Francisco (below called Anglo Bank) is, and at all times referred to herein was, a national banking association organized and existing under the laws of the United States of America and authorized to transact, and transacting, a large banking business in the State of California, with its principal place of business in the City and County of San Francisco, State of California.

Defendant American Fidelity and Casualty Company, Inc. (below called American Fidelity) is, and at all times referred to herein was, an insurance corporation organized under the laws of the State of Virginia and doing business in the State of California.

Defendant The American Plan Corporation (below called American Plan) is, and at all times referred to herein was, a corporation organized under the laws of the State of New York and the manager of the United States automobile physical damage insurance business of American Fidelity.

Defendant Mark Hart is, and at all times referred to herein was, president of American Plan, but not of American Fidelity, and a resident of the State of New York.

At all times referred to herein defendant L. Sudekum was executive vice-president of American Plan, but not a resident of the State of New York.

At all times referred to herein defendant H. Arthur Will (sued herein as John Will) was treasurer of American Plan, but not a resident of the State of New York.

Defendant Joseph Lotz is, and at all times referred to herein was, a resident of the State of California, and a licensed insurance agent in said State.

Defendant Ralph L. Smead was an employee of defendant Lotz from October, 1950 to November, 1951, and was an employee of American Plan from January, 1952 to October, 1953, and is, and at all times referred to herein was, a resident of the State of California. Defendant Smead was never an employee of American Fidelity.

No one sued herein as a Doe defendant was served with complaint or summons and for that reason no finding is made with respect to such fictitiously named defendants.

The matter in controversy exceeds, exclusive of the interest and costs, the sum of \$3,000.00.

II.

On or about May 15, 1947 Mid-States appointed Lotz its general agent for the State of California, and Lotz thereafter procured insurance business for and on behalf of Mid-States. Lotz remained such general agent for Mid-States until January 21, 1952.

On or about November 27, 1950 American Fidelity appointed Lotz its general agent for the State of California and Lotz thereafter procured insurance business for and on behalf of American Fidelity. Lotz remained such general agent for American Fidelity until August 22, 1951, when said agency was terminated by mutual agreement.

Both said agencies were of a class in which the

agent receives his commission under what is called the "retrospective" plan. Under that plan the agent must pay to the insurance company the full amount of the premium on insurance written for the company without deducting his commission, and the commission is later paid to the agent on the basis of the loss experience after the loss is determined. Under such plan the agent has a certain period of time after the close of the month in which he has written insurance to pay to the insurance company the amount of the premiums on insurance written by him for that company during that month, such period being known as the "credit period". The full amount of the premium must be paid to the company regardless of when, or whether, the agent collects such premium, the determining factor for the creation of the obligation from the agent to the company being the writing of the insurance. In the case of Lotz's agency agreement with Mid-States, said retrospective plan was modified as of September 1, 1951 by provision for an advance commission of 15% as below stated.

Under Lotz's original agency agreement with Mid-States, his credit period was 25 days. On May 1, 1951, the credit period was changed to 75 days, and Mid-States also reduced the portion of the premium retained by it from 15% to 14%. By a new agency agreement effective September 1, 1951, the credit period was reduced to 60 days, but Lotz was given the right to retain out of premiums collected an advance commission of 15%.

Under Lotz's agency agreement with American

Fidelity, his credit period was 75 days, and he was guaranteed a commission of 20% of the premiums but he was not entitled to any advance commission.

Lotz was agent for several other insurance companies besides Mid-States and American Fidelity.

III.

On or about August 1, 1951, Lotz was indebted to Mid-States for approximately \$30,000.00 and to American Fidelity for approximately \$190,000.00.

On August 22, 1951, when the agency agreement between Lotz and American Fidelity was terminated, it was estimated by Lotz and American Plan that the remaining indebtedness of Lotz to American Plan was approximately \$247,000.00. Between that date and about October 31, 1951 Lotz paid American Fidelity all but approximately \$61,000.00 of that indebtedness. About November 1, 1951 American Fidelity and Mid-States entered into an agreement under which American Fidelity cancelled insurance which had been written for it by Lotz having a premium value of approximately \$61,000.00 and Mid-States rewrote such insurance and agreed to look to Lotz for payment of said premiums. By said transaction, Lotz was credited by American Fidelity with the amount of said premiums which approximated \$61,000.00 and thus Lotz's indebtedness to American Fidelity was completely liquidated and Lotz's indebtedness to Mid-States was increased by that amount.

IV.

During the period from November, 1950 to Au-

gust, 1951, in which Lotz acted as agent for both Mid-States and American Fidelity, Lotz had decreased his underwritings for Mid-States and had written large amounts of insurance for American Fidelity. During said period Mid-States tried to reverse this tendency by urging Lotz to write more insurance for it and by giving him more favorable terms as above stated. About August 13, 1951 Lotz requested American Plan to give him a 15% advance commission but American Plan declined to do so because under its contract with American Fidelity it was not permitted to do so. About August 14, 1951, Lotz procured from Mid-States the above mentioned agreement, effective September 1, 1951, to pay him such an advance commission. Lotz wrote no more business for American Fidelity after August 22, 1951. After procuring said new agreement from Mid-States he greatly increased his underwritings for Mid-States. Such underwritings were reported by Lotz to Mid-States approximately daily, with the exception of certain rewritings of multiple policies of another company where Lotz's reporting to Mid-States was delayed several days owing to the stenographic task involved. By virtue of such reportings Mid-States was kept currently advised of such increased amounts of underwritings on its behalf.

V.

Shortly prior to November 27, 1951, Hatfield, vice-president and general manager of Mid-States, conferred with Lotz. Lotz then advised Hatfield that he was in financial difficulty, but stated that by con-

tinuing to operate his agency and by instituting certain economies and other improvements in his business practices he would be able to pay to Mid-States all that he owed it. On November 27, 1951 he gave Mid-States a letter to that effect. In said letter he outlined the steps he proposed to take, which steps included the hiring of George Kledzik, a representative of Mid-States, as Lotz's general manager with full power and authority to run the agency. Both Lotz and Hatfield then thought the plan would succeed, and Hatfield undertook to cooperate with Lotz in carrying it out. Thereafter, during the month of December, 1951 the plan was cancelled by Mid-States. As of January 1, 1952 Mid-States took the occupancy of Lotz's office, and all expenses from then on were paid by Mid-States, and Mid-States proceeded to liquidate the agency and on completion of the liquidation its loss on the agency amounted to \$281,746.96, which it seeks to recover in this action.

VI.

Under his agency agreement with Mid-States, Lotz was obliged to pay all the expenses of the agency, and since he was on a retrospective commission basis he had to wait for his commissions until loss experience on the insurance written by him had been determined (except that effective September 1, 1951 he became entitled to a 15% advance commission as elsewhere stated in these findings). Therefore he needed working capital, but he did not have any. At the time he entered into his agency agreement with Mid-States in 1947, he advised

Mid-States that he had no capital and Mid-States advised him that he could use the premiums for his expenses and that the transaction between Mid-States and Lotz was based on that arrangement.

At the outset Lotz's expenses were very small, but later his business grew until he had about 40 employees, and as his business expanded his expenses increased.

At the beginning of Lotz's agency for Mid-States Lotz did not pay any commissions to others on business which he wrote, but later and during the period involved in this litigation Lotz paid, in addition to other expenses, commissions to sub-agents from whom he got business, which commissions were deducted by such sub-agents from the premiums when they transmitted the premiums to Lotz, except in a few instances when the sub-agents paid the full premium to Lotz and Lotz then paid the commissions to the sub-agents.

From January to August, 1951, during which Lotz acted as agent for both Mid-States and American Fidelity, his operating expenses and personal drawings amounted to 15.4% of the premiums on business written by him for all companies he represented, and the percentages of commissions paid by him to sub-agents from January 1 to November 30, 1951 were as follows: On Mid-States' business, 26%; on American Fidelity's business, 23%; and on all companies which he represented, 26.7%.

In accordance with Lotz's arrangement and understanding with Mid-States as above stated, Lotz used premiums on business written for Mid-States

and other companies he represented to pay said operating expenses and personal drawings and sub-agents' commissions, and Mid-States knew that the premium moneys on its business were used by Lotz for such purposes and permitted him to engage in such practices.

In addition, Lotz commingled such premiums with other funds as below stated. He kept two bank accounts, one of which he called trustee account and the other operating account. He deposited in the trustee account premiums received by him (usually after deduction of sub-agents' commissions), salvage, subrogation and transfers from the operating account. He drew on the trustee account to pay premiums to companies he represented, to make transfers to operating account, and to pay sub-agents' commissions where not previously deducted. He drew on the operating account to pay his operating expenses and personal drawings. When he received commissions by check they were put in the operating account; when he received commissions in the form of credit against the amount he owed a company they were credited to his trustee account. He put personal borrowings into the operating account, and to replenish trustee account he made transfers from operating to trustee account.

Mid-States considered Lotz as an "independent contractor" with regard to the keeping of his books and bank account and in full charge of those matters.

Almost every month during his agency for Mid-States Lotz was overdue in making payments due

to Mid-States, and Mid-States habitually sent him demands by letter and telegrams for payment of such overdue sums, often two or three times for a single month's payment.

By virtue of the foregoing facts and other facts in relation to this agency, the court finds that premiums collected by Lotz on Mid-States' business were not trust funds in his hands for Mid-States but funds which belonged to Lotz, and that the agency agreements between Lotz and Mid-States, covering the whole period of such agency, were and each of them was modified insofar as any of the terms of such agreements were inconsistent with said fact; and it is not true as alleged in the complaint that said premiums were received and held by Lotz in a fiduciary capacity.

Said new agency agreement of September 1, 1951 between Lotz and Mid-States contained the following provisions, "All premiums received by the Agent shall be held by such Agent as trustee for the Company. The privilege of taking commissions provided in Paragraph '9' of this agreement from premiums received by such Agent shall not be construed as changing the relationship of the respective parties hereto or of the fact that the premiums received are trust funds. The keeping of an account with the Agent on the Company's books, as a creditor and debtor account, is declared a record memorandum of business transacted, and neither such keeping of account, nor alteration in compensation rate, nor failure to enforce prompt remittance or compromise or settlement or declaration of balance of account,

shall be held to waive the understanding that the premiums collected by the Agent are trust funds or change the character of such premiums”.

But the course of dealing between Mid-States and Lotz was not altered after the execution of said agreement of September 1, 1951, and on and after September 1, 1951 Mid-States continued to permit Lotz to handle premiums on its business and to handle his said bank accounts and his books and his other transactions in relation to Mid-States' business as he had done prior thereto, and the court finds that the premiums collected by Lotz after September 1, 1951 on Mid-States' business were of the same character as those collected by him prior to said date, namely that they were not trust funds but funds which belonged to Lotz.

VII.

Lotz had been a professional baseball player and only in 1947 began to conduct a business of the scale here involved. Mid-States knew that Lotz was inexperienced and unreliable in such a business, and in August, 1950 and June, 1951 the president of Mid-States, by inter-office memos, expressed the necessity for a close watch on his affairs and the fear that if Mid-States could not get better representation by Lotz it would never stay out of trouble. Nevertheless, during the period from October, 1950 to the end of 1951, Mid-States did not make or initiate any examination of Lotz's books or ask for an audit of the same, and it showed little concern

over his business methods and practices other than some aspects of his underwriting.

The loss ratio on the business written by Lotz for Mid-States from January 1, 1951 to August 31, 1951 was 64.65%, and from September 1, 1951 to December 31, 1953 it was 68.51%. The loss ratio on the business written by Lotz for American Fidelity from the beginning of his writing for them until the last transaction on said business had been run off was 79.51%. Loss ratio on Mid-States' business was computed monthly by Mid-States and was currently known by them.

In spite of the facts that Lotz's combined expenses and sub-agents' commissions on Mid-States' business amounted to over 40% and the portion of the premium retained by Mid-States was 14% and the loss ratio on said business was as above set forth, Mid-States urged Lotz to write more business for it, and Lotz's writings for Mid-States increased greatly after August 14, 1951.

By reason of the facts set forth in these findings and of other facts, the court finds that Mid-States' own conduct was to a great extent responsible for the loss for which it sues hereunder and for the creation and continuation of those activities of the Lotz agency which caused Mid-States' loss, and Lotz was not guilty of concealment of any facts which he was under any duty to disclose and Mid-States did not rely on any non-disclosure of facts by Lotz.

VIII.

At all times mentioned in the complaint and in

the complaint in intervention, Lotz's books of account were in a chaotic state and incomplete, inaccurate and inadequate for the purpose of showing the true financial condition of his agency. Among other defects in the bookkeeping, the posting of the books were several months behind. It took a group of accountants employed by Mid-States about two months to post the books and make an audit. Said group consisted of three accountants and a supervisor. Their work began in December, 1951. Lotz was also negotiating for a bank loan. And in the latter part of November, 1951 Lotz and Hatfield thought that with economies and improved business practices Lotz would be able to pay his obligations.

By the above mentioned examination and auditing of Lotz's books, it was disclosed that based on Lotz's books he had a deficiency of assets on and after August 1, 1951, but in view of the facts above stated and of other facts it is not true that defendants knew on or about August 1, 1951 or at any time prior to approximately December, 1951 that Lotz was insolvent or that he would be unable to meet his obligations to Mid-States.

Neither American Fidelity nor American Plan ever made any examination of Lotz's books nor during the period involved in this litigation did either of them know that Lotz was insolvent.

IX.

No plan or conspiracy to deceive or defraud Mid-States or Anglo Bank was entered into or carried out by defendants.

The statements made by Hart, president of American Plan, to Hatfield, vice-president and general manager of Mid-States, in the telephone conversation between those parties of about November 1, 1951 regarding the cancellation by American Fidelity of approximately \$61,000.00 premium value of insurance and the rewriting of that insurance by Mid-States were not made with any intent to deceive or defraud, and those statements were not relied upon by Hatfield or by Mid-States in entering into the contract with American Fidelity for such cancellation and rewriting of insurance, and no fraud or deceit was practiced by or on behalf of American Fidelity or American Plan with respect to that contract, and that contract and transaction were not a part of any plan or conspiracy by defendants to deceive or defraud Mid-States or Anglo Bank.

X.

Owing to the condition of Lotz's books he could not tell from his books at any time with any degree of accuracy how much he owed Mid-States or American Fidelity or any other company he represented, and Lotz's habit was to pay the company that happened to be pressing him at the time.

XI.

During the time that Lotz acted as agent for both Mid-States and American Fidelity, the business written by him for both companies was largely sub-standard business, but both companies cur-

rently knew this by virtue of daily reports and loss experience.

The loss ratio on the business written by Lotz for Mid-States was lower than that on the business written by him for American Fidelity.

XII.

No plan was conceived or prepared by defendants to induce or cause Lotz to pay to American Plan or American Fidelity funds received by him as premiums on insurance written or procured by him for Mid-States or to apply said funds to the repayment of the indebtedness of Lotz to American Fidelity. The said premiums were not received or held by Lotz as trust funds or as fiduciary for Mid-States, and it is not true that they were known by defendants to be trust funds or held by Lotz as fiduciary.

As herein stated, certain insurance written by Lotz for American Fidelity was cancelled and such insurance rewritten by Lotz for Mid-States, but this was not done pursuant to any plan or conspiracy by defendants to deceive or defraud, and said cancellation and rewriting of insurance was done pursuant to agreement legally made between Mid-States and American Fidelity. Defendants did not know at the time said agreement was entered into that Lotz would be unable to pay Mid-States the premiums on such insurance to be so rewritten, and said defendants did not plan to take any action necessary to conceal from Mid-States or Anglo Ban'

any insolvency of Lotz or inability by him to pay said premiums.

XIII.

A meeting took place on August 13, 1951, in New York in the office of defendant Mark Hart at which there were present defendants Mark Hart, Joseph Lotz, Ralph L. Smead, L. Sudekum, H. Arthur Will, and Samuel R. Feller, attorney for American Plan, but said meeting was not conceived or prepared pursuant to any plan to deceive or defraud, nor was any plan to deceive or defraud communicated to or discussed with defendants Lotz or Smead at said meeting or otherwise. No agreement was made between defendants that Lotz would pay to American Fidelity or American Plan premiums received by him on insurance written for Mid-States, and the defendants did not enter into any agreement for the purpose of defrauding or deceiving Mid-States or Anglo Bank or enriching American Fidelity or American Plan, nor did they have any such purpose.

Defendants did not conspire or agree among themselves to take any action to conceal Lotz's insolvency from Mid-States or Anglo Bank, nor did they conspire or agree among themselves that Lotz would write excessively large amounts of insurance for Mid-States or would write such insurance regardless of the nature of the risks involved or at high or excessively high advance premiums to sub-agents.

XIV.

The defendants never entered into or carried out

the plan or conspiracy referred to in the complaint or in the complaint in intervention, or any such plan or conspiracy.

Defendant Lotz was not guilty of any concealment of insolvency on his part and did not agree to divert to American Fidelity or American Plan any funds held or to be received by him for Mid-States as premiums on insurance written by him for Mid-States. Lotz did not conspire or agree with any other defendants as alleged in the complaint or in the complaint in intervention. The rewriting of insurance previously written by him for American Fidelity was not done for the purpose of enabling American Fidelity to reduce the amount of otherwise uncollectible indebtedness due it from Lotz at the expense of Mid-States. New insurance written by Lotz for Mid-States was large in amount, and some of it was of sub-standard risk, and Lotz paid advance premiums on it to sub-agents, but Mid-States currently received reports of such insurance and Mid-States knew that Lotz was paying the advance commissions to sub-agents thereon, and Lotz was not guilty of any concealment in regard to said matters. The proceeds of the checks described in paragraph XVIII of these findings were deposited by Lotz in his bank account referred to by him as trustee account, and Lotz thereafter made payments out of said account to American Fidelity which payments included in part funds derived from the proceeds of some of the checks above mentioned. Among said checks were checks drawn by Public Service Insurance Co. on Pacific National Bank of

San Francisco totalling \$94,136.69, which latter checks represented the unearned premiums paid by Public Service Insurance Co. for the rewriting by Mid-States of a large block of policies which had previously been written by Public Service Insurance Co. and which by agreement made with Lotz acting on behalf of Mid-States were cancelled by Public Service Insurance Co. and rewritten by Mid-States. Lotz did not surrender to American Fidelity or American Plan full control and authority over his agency and finances, but the only authority given to American Fidelity or American Plan was that referred to in the Memorandum of Agreement dated August 22, 1951, Exhibit 2 to the complaint herein.

For the reasons herein stated, Lotz was not guilty of any concealment, fraudulent or otherwise, from Mid-States or Anglo Bank in such matters, either at the direction or instigation of the other defendants or by agreement with them or at all.

American Plan refused Lotz's request for an advance commission as herein stated and Lotz promptly thereafter advised Mid-States that he had tried to get a better deal from American Plan and had failed, but no concealment, misrepresentation or deceit was practiced by Lotz or any other defendant upon Mid-States or Anglo Bank in that connection.

On or about August 22, 1951, and not August 17, 1951, American Fidelity, American Plan, Lotz and Smead entered into a written agreement, which

written agreement is attached to the complaint and to the complaint in intervention herein as Exhibit 2. Said agreement contains the following provision:

“The Manager hereby appoints Ralph L. Smead as its representative and Lotz agrees that the said representative shall have full authority over the finances of the agency and in connection with the matters referred to herein subject to instructions of the Manager.”

Said agreement did not give Smead as representative of American Fidelity and American Plan full and complete control and authority over the financial affairs of defendant Lotz and his insurance agency but over the finances of said agency insofar as such finances related to the payment to American Fidelity of the obligation of Lotz to said company as described in said agreement and to the other duties and rights of Lotz in respect of his agency for American Fidelity as therein stated. Said agreement was not entered into nor was such authority given for the purpose of diverting to American Fidelity or American Plan any funds held or received by Lotz representing premiums on insurance written by Lotz for Mid-States.

The letter from Mark M. Hart to Ralph L. Smead dated August 17, 1951, and the agreement above mentioned dated August 22, 1951, which are attached as Exhibits 1 and 2 respectively to the complaint and the complaint in intervention herein are true and correct copies of the documents which they purport to represent, but the said letter, Exhibit 1, was actually given on August 22, 1951 rather than

August 17, 1951. Lotz did not hold any trust funds for Mid-States, and therefore Lotz did not wrongfully abandon to other defendants control over any trust funds belonging to Mid-States, nor did defendants or any of them divert from Mid-States to or for the benefit of American Fidelity or American Plan any trust funds held or received by Lotz as trustee for Mid-States.

By November 1, 1951 the indebtedness of Lotz to American Fidelity had been reduced to approximately \$61,000.00, but said reduction was not made or accomplished by virtue of the diversion to American Fidelity or American Plan of any trust funds belonging to Mid-States. When American Fidelity and Mid-States entered into the agreement for the cancellation and rewriting of said insurance of the premium value of \$61,000.00, as above referred to in these findings, defendants did not know that Lotz would be unable to pay Mid-States the premiums that would be payable to Mid-States thereunder. Defendants were not guilty of any fraudulent concealment or affirmative misrepresentations in respect to said transaction of cancellation and rewriting of insurance, and neither Mid-States nor Anglo Bank suffered any deception in respect of said transaction nor did either of them rely on any of said representations in entering into said contract. Shortly after said contract was entered into, American Fidelity cancelled its said insurance in accordance therewith, and its avoidance of obligations under such insurance and the shifting of said obligations to Mid-States were not wrongful but

were in accordance with the terms of said contract. In the extinction of Lotz's obligation to American Fidelity by virtue of said transaction, no wrong was exercised against Mid-States or Anglo Bank.

From approximately August 13, 1951, American Fidelity and American Plan for the purpose of ensuring the payment of the debt due it by Lotz, exerted great pressure on Lotz to collect the amount due from Lotz to them, but said defendants did not induce Lotz to pay excess commissions for insurance business, and said pressure was not a part of any plan or conspiracy to defraud Mid-States or Anglo Bank, nor as a part of any plan or conspiracy to defraud did Lotz pay commissions which were in excess of the amount to be received by him as his general agency commission. Because of loss ratio on business written by Lotz in 1951 and because of Lotz's commissions paid by Lotz on said business and his other expenses, Lotz suffered losses which further increased the amounts owed by him to Mid-States, but Mid-States was aware of the said loss ratios and of the fact that Lotz was paying such commissions and other expenses, and no concealment or misrepresentation was exercised by American Plan or American Fidelity against Mid-States or Anglo Bank in that connection. Lotz was not induced or compelled by virtue of pressure or influence exercised on him by American Fidelity or American Plan to accept insurance business of a sub-standard class. No underwriting loss of Mid-States was due to any fraud or conspiracy as alleged in the complaint or complaint in intervention

or at all or to any business written by Lotz for Mid-States due to any such fraud or conspiracy.

XV.

Shortly prior to December 1, 1951 Mid-States learned that Lotz would be unable to pay the amount that would be due Mid-States on December 1, 1951 but owing to the condition of Lotz's books the financial condition of Lotz and his ability to pay his debts were not then known. Neither Mid-States nor Anglo Bank ever learned of a plan or conspiracy of defendants to defraud or deceive it or of any acts pursuant thereto, because no such plan existed.

On December 18, 1951 Mid-States wrote Lotz terminating his agency with Mid-States effective as of January 21, 1952.

Thereafter demand was made by Mid-States on defendants for damages because of the matters alleged in the complaint but defendants refused and still refuse to pay the sums demanded or any portion thereof.

Lotz is unable to pay to Mid-States the sum demanded by it.

XVI.

Mid-States has not been damaged in the sum of \$297,097.91 or in any other sum as a result of any plan or conspiracy of defendants to defraud it or of any acts done, permitted, directed or suffered by defendants pursuant thereto.

XVII.

Defendants have not been guilty of any fraud or deceit and have not been actuated by any malice towards Mid-States.

XVIII.

About the 31st day of August, 1951, Joseph Lotz opened a commercial account with Anglo Bank at its office at 1450 Broadway, Oakland, California, entitled "Joe Lotz, Trustee", and thereafter proceeded to endorse and deposit therein various checks made payable to the order of Mid-States, which Joseph Lotz represented and warranted to Anglo Bank he was authorized to endorse on behalf of Mid-States, among which were the following drawn by Public Service Insurance Co. on Pacific National Bank of San Francisco:

Check No.	Date of Check	Amount	Date of Deposit
3590	Sept. 7, 1951	\$ 5,547.25	Sept. 11, 1951
3611	Sept. 14, 1951	67,500.00	Sept. 18, 1951
3628	Sept. 24, 1951	11,250.00	Sept. 25, 1951
3660	Sept. 28, 1951	3,750.00	Oct. 1, 1951
3699	Oct. 15, 1951	6,089.44	Oct. 16, 1951

and among which was the following drawn by George R. Fulmore on Bank of America, National Trust and Savings Association:

Check No.	Date of Check	Amount	Date of Deposit
980	Nov. 16, 1951	\$ 1,484.65	Nov. 20, 1951

and among which were the following drawn by Jackson Motor Sales on the Anglo California National Bank, Chico, California:

Check No.	Date of Check	Amount	Date of Deposit
4868	Oct. 13, 1951	\$ 1,000.00	Oct. 18, 1951
4902	Nov. 10, 1951	800.00	Nov. 15, 1951

XIX.

On the 28th day of February, 1952, Mid-States commenced an action in this court entitled "Mid-States Insurance Company, a corporation, Plaintiff, vs. The Anglo California National Bank of San Francisco, a national banking association, Defendant", and numbered 31311 on the records and files of this court, alleging therein that while Lotz had authority to receive the above checks, he had no authority to endorse them for Mid-States, and prayed for a judgment against Anglo Bank for the amount thereof, plus certain other checks, with interest thereon at the rate of seven per cent (7%) per annum, and costs of suit incurred therein.

XX.

At the time the said checks were endorsed and deposited by Lotz as aforesaid, Anglo Bank believed that he was authorized to endorse and deposit the same. Thereafter Anglo Bank was advised and informed by Mid-States that Lotz had no authority to endorse checks made payable to Mid-States and that defendants had entered into a plan and conspiracy to deceive and defraud as above referred to and had committed the various alleged acts pursuant thereto, and until such time Anglo Bank had no knowledge, information or belief concerning said alleged matters.

It is not true that at all of the times mentioned in the complaint in intervention defendants knew that Joseph Lotz was insolvent and unable to meet his obligations.

XXI.

The checks referred to in paragraph XVIII of these findings constituted premiums on insurance written for Mid-States by Lotz. Mid-States claims that said funds were wrongfully diverted by Lotz from Mid-States and the amount thereof constitutes part of the claim made by Mid-States against defendants herein.

XXII.

The issues between Mid-States and Anglo Bank in Action No. 31311 were tried before the above entitled court. In the pleadings in said case and at the trial of said issues Anglo Bank defended against the claim of Mid-States on the ground that Lotz had authority to endorse said checks and on the ground of estoppel and other grounds. After said trial the case was submitted to the trial judge for his decision, and while the case was thus under submission and without any decision thereof Anglo Bank consented to the entry of a judgment against it of \$37,500.00, and accordingly such a consent judgment was entered therein.

XXIII.

Anglo Bank has not been damaged to the extent of said sum of \$37,500.00, or any other sum, as a result of any plan or conspiracy of defendants to defraud and deceive or as a result of any acts done, permitted, directed or suffered by defendants herein pursuant to any such plan or conspiracy or otherwise.

In representing that he had authority to endorse said checks, Lotz believed he had such authority and did not intend to deceive Anglo Bank, nor did any other defendant have any such intention, nor did Lotz or any other defendant think that Anglo Bank would be exposed to any liability to Mid-States in accepting or acting on such endorsement.

XXIV.

Defendants have not been guilty of any fraud or deceit and have not been actuated by malice towards Anglo Bank.

XXV.

Any and all allegations contained in the pleadings herein which may be inconsistent with the findings herein contained are untrue.

XXVI.

Where reference is made in these findings to the complaint in intervention, such reference shall be deemed also to include the third party complaint in Action No. 31311 which consists substantially of the same allegations as the complaint in intervention.

XXVII.

No evidence having been offered in support of the counter-claim of defendant Lotz or of the counter-claims of American Fidelity and American Plan, said defendants are not entitled to take anything by way of said counter-claims.

From the foregoing facts, the Court concludes:

Conclusions of Law

1. That plaintiff Mid-States Insurance Company take nothing by its complaint against defendants;

2. That The Anglo California National Bank of San Francisco, plaintiff in intervention in Action No. 31496 and third party plaintiff in Action No. 31311, take nothing by its complaint in intervention or its third party complaint against defendants and third party defendants;

3. That defendants and third party defendants Joseph Lotz, American Fidelity and Casualty Company, Inc. and The American Plan Corporation take nothing by their counter-claims against Mid-States Insurance Company and The Anglo California National Bank of San Francisco; and

4. That the respective parties pay their own costs.

Let judgment be entered accordingly.

Dated: December 16, 1954.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

Acknowledgment of Service attached.

[Endorsed]: Filed December 16, 1954.

In the United States District Court, Northern District of California, Southern Division

No. 31496

MID-STATES INSURANCE COMPANY, etc.,
Plaintiff,

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO, etc.,
Plaintiff in Intervention,

vs.

AMERICAN FIDELITY AND CASUALTY
COMPANY, INC., etc., et al.,
Defendants and Third Party Defendants.

JUDGMENT

The above entitled cause came on regularly for trial on May 3, 1954, before the above entitled Court, Honorable Michael J. Roche, Chief Judge, presiding, sitting without a jury, and the trial of said action proceeded on said day and succeeding days upon the issues presented by the pleadings; and proof having been presented on behalf of the respective parties, and the parties having appeared by their respective attorneys, except defendant Ralph L. Smead who appeared in propria persona, and the Court being fully advised in the premises, and an opinion dated October 11, 1954 having been rendered, and Findings of Fact and Conclusions of Law having been made by the Court,

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff take nothing by its complaint herein;

2. That Plaintiff in Intervention take nothing by its complaint in intervention herein or by its third party complaint in Action No. 31311;

3. That defendant Joseph Lotz take nothing by way of his counter-claim herein;

4. That defendants American Fidelity and Casualty Company, Inc. and The American Plan Corporation take nothing by way of their counter-claims herein;

5. That each party pay its own costs.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

Entered in Civil Docket Dec. 17, 1954.

[Endorsed]: Filed Dec. 16, 1954.

[Title of District Court and 'Causes 31496-31311.]

MOTION FOR NEW TRIAL, MOTION FOR
MODIFICATION OF FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND MO-
TION TO ALTER AND AMEND JUDG-
MENT AND NOTICE OF HEARING
THEREOF

To defendant Ralph L. Smead appearing in propria persona, and to the other defendants above-named and their respective attorneys:

You and each of you will please take notice that plaintiff, Mid-States Insurance Company, a corpor-

ation, and Plaintiff in Intervention, The Anglo California National Bank of San Francisco, a national banking association, by their undersigned attorneys move the above-entitled Court for a new trial in the above-entitled cause, for a modification of the findings of fact and conclusions of law therein and to alter and amend the judgment therein and that the said motions will be heard on Thursday the 6th day of January, 1955, at the hour of 10:00 o'clock a.m. on said day or as soon thereafter as counsel may be heard before the Honorable Michael J. Roche, Chief Judge of said Court in Room 338 of the United States Post Office Building, Seventh and Mission Streets, San Francisco, California.

Said motion will be based upon the files and records in said proceeding and upon the Memorandum on Motion for New Trial, etc., hereunto annexed.

Dated: December 27, 1954.

/s/ WALLACE, GARRISON, NORTON
& RAY

/s/ MAYNARD GARRISON
Attorneys for Plaintiff, Mid-States
Insurance Company.

/s/ SEVERSON, McCALLUM & DAVIS
/s/ ALMON McCALLUM

Attorneys for Plaintiff in Intervention, The Anglo
California National Bank of San Francisco.

MEMORANDUM

Plaintiff and plaintiff-in-intervention respectfully present their grounds for motions heretofore made

to the Court for a new trial for modification and amendments to findings of fact and conclusions of law and for alteration and amendment of the judgment.

So far as material hereto, Rule 59(a) F.R.C.P. provides as follows:

"A new trial may be granted to all or any of the parties and on all or part of the issues * * * in a case tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered * * * amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

Motion for a new trial in a cause tried before the Court was intended to be the equivalent of a petition for a rehearing.

Notes of Advisory Commission on Rules 28, U.S.C.A., Rule 59, page 271.

It is the position of plaintiff and plaintiff-in-intervention herein that this cause should be reheard and redetermined first, for the reason that the Court in its written opinion considered the impact of the testimony produced at the trial upon only one of the legal issues. That was the issue of conspiracy.

Two legal bases were before the Court and argued

in the briefs on behalf of the plaintiff. The one which the Court has failed to rule upon is that brought about by the conceded breach by defendant Lotz of his fiduciary duties to Mid-States Insurance Company and the knowing participation therein by the other defendants. It is respectfully requested that this Court consider the evidence in the light of this alternative ground upon which relief might have been afforded to the plaintiff and to the plaintiff-in-intervention.

Clearly, plaintiff and plaintiff-in-intervention were entitled to recover upon any theory which the facts justified regardless of the demand in the pleadings.

Hammel vs. Maryland Casualty Co. (1954)
209 F(2d) 338.

Should the Court feel that amendment to conform to proof is necessary oral motion for such amendment will be duly made at the time the written motions are heard.

Secondly, there is no dispute that defendant Lotz diverted fiduciary funds belonging to the plaintiff and it is respectfully submitted that the Court erred in giving judgment in his favor and against the plaintiff and plaintiff-in-intervention.

It is therefore requested that this Court grant plaintiff's motion for rehearing or in the event that motion be not granted, amend the findings of fact in accordance with the proposed amendments attached hereto and amend the judgment by entering

judgment in favor of plaintiff and plaintiff-in-intervention and against the defendants herein.

Respectfully submitted,

/s/ WALLACE, GARRISON, NORTON
& RAY

Attorneys for Plaintiff, Mid-States
Insurance Company.

/s/ SEVERSON, McCALLUM & DAVIS
/s/ ALMON McCALLUM

Attorneys for Plaintiff in Intervention, The Anglo
California National Bank of San Francisco.

Proposed Amendments by Mid-States Insurance
Company, a Corporation, Plaintiff, and the
Anglo California National Bank of San Francisco,
a National Banking Association, Plaintiff in
Intervention, to Findings of Fact and
Conclusions of Law as Proposed by Defendants
American Fidelity and Casualty Company, Inc.,
a Corporation, and the American Plan Corporation,
a Corporation.

Comes Now Mid-States Insurance Company, a
corporation, Plaintiff, and The Anglo California
National Bank of San Francisco, a national banking
association, Plaintiff in Intervention, and each
severally propose the following amendments to the
Findings of Fact and Conclusions of Law as heretofore
served and filed by defendants.

I.

Amend Finding II, page 3, by inserting in line 32, after the word "agencies" the following:

"prior to September 1, 1951."

2.

Amend Finding II, by inserting after line 24, on page 4, the following:

"Said new Agency Agreement provided that 'All premiums received by the Agent shall be held by such Agent as trustee for the Company. The privilege of taking commissions provided in Paragraph '9' of this agreement from premiums received by such Agent shall not be construed as changing the relationship of the respective parties hereto or of the fact that the premiums received are trust funds. The keeping of an account with the Agent on the Company's books, as a creditor and debtor account, is declared a record memorandum of business transacted, and neither such keeping of account, nor alteration in compensation rate, nor failure to enforce prompt remittance or compromise or settlement or declaration of balance of account, shall be held to waive the understanding that the premiums collected by the Agent are trust funds or change the character of such premiums.' "

3.

Amend Finding III, page 5, by adding on line 8 after the word "indebtedness":

"That a portion of the monies paid American Fidelity during this period were premiums collected

by Lotz for policies of insurance written in Mid-States.”

4.

Amend Finding III, page 5, by adding after line 18, the following:

“Upon the completion of the liquidation of Lotz’ indebtedness to American Fidelity his indebtedness to Mid-States had increased from approximately \$30,000 on August 1, 1951 to \$281,746.96; that said \$281,746.96 is the net amount loss sustained by Mid-States after crediting Lotz’s account with \$37,500 received from Anglo, Plaintiff in Intervention. That no part of either of said amounts have been paid.”

5.

Amend Finding IV, page 5, line 20, by inserting after “1951” the words: “after the meeting in New York.”

6.

Amend Finding IV, page 6, by deleting after the word “such” on line 3 through line 9, and insert in their place the following:

“The policies involved in the cancellation and re-writing of the Public Service policies, which were not reported to Mid-States until their cancellation and re-writing had been substantially completed. That Hatfield’s first knowledge of the cancelling and re-writing of the Public Service policies in Mid-States was the receipt by him two to three weeks later of a block of several hundred policies.”

7.

Amend Finding V, page 6, by deleting lines 21, 22, 2^c and 24, reading as follows:

“Both Lotz and Hatfield then thought the plan would succeed and Hatfield undertook to cooperate with Lotz in carrying it out. Thereafter during the month of December 1951 the plan was cancelled by Mid-States.”

And substitute the following in their place:

“Said plan was never accepted by Mid-States and was specifically rejected by it in December of 1951. That in the month of December 1951 Lotz and Smead advised Hatfield that they were insolvent. That that fact had been reported to The American Plan Corporation in August at their meeting in New York. That in addition, both Lotz and Smead gave written statements, Exhibits Pl 6, 11, 12, 13 and 14, setting forth in detail the subject matters discussed.”

8.

Amend Finding VI, page 6, line 31, by inserting:
“prior to September 1, 1951.”

9.

Amend Finding VI by adding to line 5 on page 8 the following:

“Mid-States did not know, nor did it ever authorize Lotz to use premiums collected on insurance written in Mid-States to pay for insurance written by Lotz in other companies.”

10.

Amend Finding VI, page 8, by inserting after the word “Lotz” on line 32, the words: “after September 1, 1951.”

11.

Amend Finding VI, page 9, by inserting after the word "agreements" on line 2, the words: "effective prior to September 1, 1951", and line 3 by inserting after the word "agency" the words: "prior to September 1, 1951."

12.

Amend Finding VI, page 9, by deleting lines 24 through 32, and lines 1 and 2 on page 10, and take in their place the words:

"That at all times while Lotz acted as the agent of Mid-States under contracts referred to he was familiar with the duties of an insurance agent in the State of California with respect to trustee funds."

13.

Amend Finding 7, on page 10 by adding at line 15 the words:

"That after April 1951 and until December 1951 Lotz's account with Mid-States was current and Mid-States had no knowledge that Lotz was insolvent or that he was using monies received by him on policies written in Mid-States to pay his account with American Plan and American Fidelity. That under the agent's agreement entered into September 1, 1951 it was Lotz's duty to receive all premiums on business written in Mid-States as its trustee and to maintain said trust funds in a trustee account created for that purpose. That it was not the duty or obligation of Mid-States to examine or audit Lotz's books excepting after notice that he was in-

solvent or had violated the terms of his contract.”

14.

Amend Finding 7 on page 10 by deleting lines 30 through line 5 on page 11 and adding in their place the following:

“The loss suffered by Mid-States was caused by the fact that Lotz, without its knowledge or consent used premium monies received by him on insurance written in Mid-States to pay his account with American Plan and American Fidelity for business written in those companies. Mid-States did nothing after September 1, 1951 that caused or contributed to any act of Lotz’ or to Mid-States loss. After September 1, 1951 Mid-States relied upon Lotz to perform his contract and to report any fact or suggestion involving a breach of his duty as their agent.”

15.

Amend Finding VIII, page 11, by deleting line 14, commencing with the word “said” to and including line 19 and inserting in their place the following: “That at all times it was possible for Lotz to determine from his records the approximate balance due companies on business written by him. That in addition to those records, Lotz was furnished monthly by each company statements of the balances due them on all business written.”

16.

Amend Finding VIII, page 11, by deleting line

23 commencing with the word "it" to and including line 26 and insert in their place the following:

"it is true that in August 1951 Lotz and Smead advised American Plan and American Fidelity at the meeting in New York that they did not have funds or assets sufficient to meet their liabilities, and that they could not make a payment then currently overdue to American Plan."

17.

Amend Finding VIII, page 11 by striking the words commencing with "nor" on line 28 to and including line 30.

18.

Strike Finding X, on page 12, line 17 to and including line 21.

19.

Amend Finding XII, on page 13, by inserting on line 4, after the word "premiums" the words: "prior to September 1, 1951."

20.

Amend Finding XIV, on page 15, at line 4, by inserting after the word "mentioned" the following:

"That during the month of September 1951 Lotz entered into an agreement with the Public Service Insurance Co. whereby a block of policies previously written by that company would be cancelled and re-written in Mid-States. That upon said cancellation and re-writing, Public Service paid to Lotz the unearned premiums on said policies as alleged, in the sum of approximately \$97,000.00. That all of said premiums were deposited by Lotz in his bank account with Anglo as trustee, and

thereafter all or substantially all of said monies were withdrawn from said trustee account and paid to the American Fidelity and American Plan. That Hart knew that said cancellation and re-writing of the block of policies had taken place and also knew that his company had no right to receive or participate in any part of said premiums.”

21.

Amend Finding XIV, on page 16, by inserting before the word “by” on line 16 the following words: “prior to September 1.”

22.

Amend Finding XIV on page 16 by inserting after line 29 the following:

“Said Exhibit ‘1’ dated August 17, 1951 contained the following instructions by American Plan to its agent Smead as follows: ‘As the representative of this corporation, you have full authority to deposit to the account of The American Fidelity and Casualty Company at the Central Bank in Oakland all monies received by Lotz after taking into consideration the deduction prescribed in said agreement. You are to have full and supreme authority regarding financial affairs of Joseph Lotz, subject to instructions that may be transmitted to you from time to time by the American Plan Corporation, and in the event that you are prevented from performing your responsibility in any respect it will be your duty to notify immediately the American Plan Corporation.’ ”

23.

Amend Finding XIV, on page 17, by inserting in line 2 after the word "Mid-States" the following:

"Said reduction was accomplished at least in part by the payment to American Fidelity and American Plan of monies received by Lotz in the form of premiums on policies written in Mid-States."

24.

Amend Finding XV, on page 18 by adding to line 22 the following:

"Lotz and Smead did, however, in December of 1951 state to Hatfield that they had entered into a conspiracy with American Plan and American Fidelity and that they had commenced with the 14th day of August to divert monies received by Lotz for premiums on policies written in Mid-States to American Fidelity."

25.

Amend Finding XV, page 18 by adding after line 30 the following:

"Lotz's inability to pay Mid-States the balance due on his account results from the fact that substantial portions of monies received by him from policies written in Mid-States were paid to American Fidelity in liquidation of his account with it."

26.

Amend Finding XVIII, on page 19 by inserting at line 12 after the word "Lotz" the following:

"and Ralph Smead."

27.

Amend Finding XXI, page 20, by deleting line 26 commencing with the word "Mid-States" to and including line 28, and inserting in its place the following:

"The monies received by Lotz from said checks were substantially diverted by Lotz from Mid-States and paid to American Fidelity."

28.

Amend Finding XXIII, page 21 by deleting on line 16 the words "believed he had such authority and did not" and inserting in place thereof the following:

"and Smead knew they did not have authority and they did."

29.

Further amend said Paragraph XXIII, page 21, by deleting line 18 commencing with the word "nor" through and including line 20.

30.

Amend Finding XXIV, page 21, by deleting lines 22 and 23 and substitute the following:

"On August 27, 1951 Joe Lotz wrote Mid-States asking for authority to endorse checks payable to Mid-States. On August 31, 1951 Joe Lotz opened a trustee account with Anglo Bank and at that time told Anglo Bank he had authority to endorse checks payable to Mid-States and would deliver to Anglo Bank evidence of his authority to endorse such checks. On September 5, 1951 Mid-States wrote

Lotz refusing to grant him authority to endorse checks payable to Mid-States; that Lotz never advised Anglo Bank that Mid-States had refused him permission to endorse checks payable to his order; that on several occasions following receipt of Mid-States letter dated September 5, 1951, Smead told Anglo Bank that Lotz had authority to endorse checks payable to Mid-States. That the checks referred to in Finding XVIII were deposited by Lotz with Anglo Bank after Lotz and Smead had been advised by Mid-States that they had no authority to endorse checks payable to Mid-States. That Lotz and Smead are guilty of misrepresenting to Anglo-Bank the authority of Lotz to endorse checks payable to Mid-States and guilty of concealing from Anglo Bank the refusal of Mid-States to give Lotz authority to endorse its checks. That at all such times of telling Anglo Bank that Lotz had authority to endorse checks of Mid-States, Smead was the agent of American Fidelity and American Plan and acting within the scope of his agency. That as a result of such misrepresentation and deceit Anglo Bank has been damaged in the sum of \$37,500."

Respectfully submitted,

WALLACE, GARRISON, NORTON
& RAY and LEWIS SCHIMBERG
SEVERSON, McCALLUM & DAVIS

/s/ By MAYNARD GARRISON

/s/ ALMON McCALLUM

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 27, 1954.

[Title of District Court and Causes 31496-31311.]

ORDER

Order Denying Motions for New Trial, for Modification of Findings of Fact and Conclusions of Law and to Alter and Amend Judgment.

Plaintiff, Mid-States Insurance Company, and plaintiff in intervention, defendant and third party plaintiff, The Anglo California National Bank of San Francisco, having moved this Court for a new trial in the above-entitled cause, for a modification of the findings of fact and conclusions of law therein and to alter and amend the judgment therein, and said motions having duly come on to be heard on the 13th day of January, 1955, now therefore,

It Is Hereby Ordered that the said motions be and the same are hereby in all respects denied.

/s/ MICHAEL J. ROCHE

Chief Judge, United States District Court.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Causes 31496-31311.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Mid-States Insurance Company, a corporation, plaintiff above named in action numbered 31496, and The Anglo California National Bank of San Francisco, a national bank-

ing association, plaintiff in intervention in action numbered 31496, and third-party plaintiff in action numbered 31311, hereby severally appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above consolidated action on December 17, 1954.

Dated: San Francisco, January 27, 1955.

LEWIS SCHIMBERG,
MAYNARD GARRISON,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON
& RAY

By MAYNARD GARRISON,

Attorneys for Plaintiff

ALMON McCALLUM

SEVERSON, McCALLUM & DAVIS

By ALMON McCALLUM,

Attorneys for Plaintiff in Intervention, Defendant
and Third Party Plaintiff The Anglo Califor-
nia National Bank of San Francisco.

[Endorsed]: Filed February 7, 1955.

[Title of District Court and Causes 31496-31311.]

STATEMENT OF POINTS

The points upon which plaintiff-appellant Mid-States Insurance Company (hereinafter referred to as "Mid-States") intends to rely on this appeal are as follows:

(1) The court erred in entering judgment that plaintiff take nothing by its complaint.

(2) The court erred in failing to find that Joseph Lotz (hereinafter referred to as "Lotz") was indebted to Mid-States in the sum of \$281,746.96, as to which there was no conflict in the evidence.

(3) The court erred in finding that Mid-States permitted Lotz to use premiums collected by him for Mid-States to pay his operating expenses, personal drawings and sub-agent's commissions after September 1, 1951. (Finding VI.)

(4) The court erred in finding that the funds collected by Lotz for Mid-States merely constituted a debt in that amount rather than trust funds. (Findings VI, XII and XIV.)

(5) The court erred in concluding that Mid-States' new agency agreement with Lotz (dated September 1, 1951) was modified so that premiums collected by Lotz for Mid-States were not trust funds. (Finding VI.)

(6) The court erred in holding that Lotz was not guilty of concealment of any facts which he was under a duty to disclose to Mid-States and that Mid-States did not rely on any non-disclosures by Lotz. (Findings VII and XIV.)

(7) The court erred in refusing to hold that defendant Lotz had violated his fiduciary duties as agent of Mid-States and that the remaining defendants had participated in such breach.

(8) The court erred in finding that the statements made by the president of The American Plan Corporation (hereinafter referred to as "American Plan") to the vice president and general manager of Mid-States on or about November 1, 1951 regarding the rewriting by Mid-States of insurance being cancelled by American Fidelity and Casualty Company, Inc. (hereinafter referred to as "American Fidelity") were not made with intent to deceive or defraud, that said statements were not relied upon by Mid-States, that no fraud or deceit was practiced by American Fidelity or American Plan with respect to said contract and that the same was not part of any plan by defendants to defraud Mid-States. (Finding IX.)

(9) The court erred in finding that the re-writing by Lotz of insurance previously written by him for American Fidelity was not done for the purpose of enabling American Fidelity to reduce the amount of otherwise uncollectible indebtedness due it from Lotz at the expense of Mid-States. (Finding XIV.)

(10) The court erred in holding that defendants did not engage in a conspiracy to defraud plaintiff. (Finding IX, XII, XIII, XIV and XVII.)

(11) The court erred in finding that defendants did not know of Lotz' insolvency prior to December, 1951 (Finding VIII) or that Lotz would be unable to meet his obligations to Mid-States. (Finding XIV.)

(12) The court erred in failing to find that Lotz was insolvent on and after August 1, 1951 and that the defendants at all times thereafter believed him to be insolvent.

(13) The court erred in finding that by the written agreement dated August 22, 1951, between American Fidelity, American Plan and Lotz, Smead was given control over the finances of the Lotz agency only as they pertained to the payment to American Fidelity of the obligation owed that firm by Lotz. (Finding XIV.)

(14) The court erred in failing to find that Smead was the agent of American Fidelity and American Plan and had full and complete control and authority over the financial affairs of Lotz and his agency and in failing to find that while acting as their agent he wrongfully diverted funds belonging to Mid-States to defendants American Fidelity and American Plan.

(15) The court erred in finding that the reduction of the indebtedness of Lotz to American Fidelity to approximately \$61,000 by November 1, 1951 was not accomplished by virtue of the wrongful diversion to American Fidelity or American Plan of funds belonging to Mid-States. (Finding XIV.)

(16) The court erred in holding that Mid-States suffered no loss due to any fraud or conspiracy of defendants. (Finding XIV.)

(17) The court erred in denying Mid-States' Mo-

tion for New Trial, for Modification of Findings of Fact and Conclusions of Law and to Alter and Amend Judgment.

/s/ LEWIS SCHIMBERG,

/s/ MAYNARD GARRISON,

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff Mid-States Insurance Company.

Acknowledgment of Service attached.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Causes 31496-31311.]

DESIGNATION BY MID-STATES
INSURANCE COMPANY

To: The Clerk of the United States District Court
for the Northern District of California, Southern Division:

Mid-States Insurance Company, plaintiff and appellant, hereby designates the following in this consolidated case to be contained in the record on appeal:

1. The complaint of Mid-States Insurance Company in action number 31496 and the exhibits thereto attached;

2. Answer of defendant Ralph L. Smead in action number 31496;

3. Pages One, Two and down to line Six of page Three of the Answer of defendant Joseph Lotz in action number 31496;

4. Answer of defendants American Fidelity and Casualty Company, Inc., and The American Plan Corporation in action number 31496;

5. The transcript of the testimony, appearances and all the evidence and exhibits introduced at the trial of the consolidated actions;

6. Opinion dated October 11, 1954;

7. Findings of Fact and Conclusions of Law;

8. Judgment entered December 17, 1954;

9. Motion for New Trial, for Modification of Findings of Fact and Conclusions of Law and to Alter and Amend Judgment and Notice of Hearing Thereof; Memorandum, and Proposed Amendments by Mid-States Insurance Company and The Anglo California National Bank of San Francisco to Findings of Fact and Conclusions of Law attached to said Motion;

10. Order Denying Motions for New Trial, for Modification of Findings of Fact and Conclusions of Law and to Alter and Amend Judgment;

11. Notice of Appeal;

12. Statement of Points on Appeal by plaintiff.

13. This designation of contents of record on appeal.

/s/ LEWIS SCHIMBERG,

/s/ MAYNARD GARRISON,

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff Mid-States
Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Causes 31496-31311.]

STIPULATION FOR THE TRANSMITTAL OF
ORIGINAL EXHIBITS

It is stipulated by and between the parties hereto through their attorneys of record that the exhibits in the above-entitled causes, as consolidated, may be transmitted in their original form to the Clerk of the United States Court of Appeals for the Ninth Circuit for the use by that Court in their consideration of this appeal.

/s/ LEWIS SCHIMBERG,
/s/ MAYNARD GARRISON,
/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff Mid-States Insurance Company.

/s/ SEVERSON, McCALLUM & DAVIS,
/s/ ALMON McCALLUM,

Attorneys for Plaintiff in Intervention, The Anglo-California National Bank of San Francisco.

/s/ HAROLD R. McKINNON,
/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Defendants American Fidelity and Casualty Company, Inc., The American Plan Corporation, Inc.

/s/ RICHARD F. TIEDEMAN,
/s/ PETER D. KAKURES,

Attorneys for Defendant Joseph
Lotz.

ORDER FOR TRANSMITTAL OF ORIGINAL
EXHIBITS

It is ordered that the Clerk of this Court shall transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit the original exhibits in the above-entitled cases, to be safely kept by the said Clerk for the use of that Court in the consideration of this appeal, and thereafter to be returned by him to this Court.

Dated: March 9th, 1955.

/s/ MICHAEL J. ROCHE,
Chief Judge, United States District
Court.

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Causes 31496-31311.]

DESIGNATION BY APPELLANT THE
ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO

To: The Clerk of the United States District Court
for the Northern District of California, South-
ern Division:

The Anglo California National Bank of San Francisco, a national banking association, plaintiff in intervention and defendant and third party plaintiff and appellant, hereby designates the following in this consolidated case to be contained in the record on appeal to supplement the designation

filed by appellant Mid-States Insurance Company:

1. Complaint in Intervention in action number 31496.

2. Answer of defendants American Fidelity and Casualty Company, Inc., a corporation, and the American Plan Corporation, a corporation, to Complaint in Intervention in action number 31496.

3. Complaint in action number 31311.

4. Answer in action number 31311.

5. Third Party Complaint in action number 31311.

6. Answer of third party defendants American Fidelity and Casualty Company, Inc., a corporation, and The American Plan Corporation, a corporation, to Third Party Complaint in action number 31311.

7. Answer of third party defendant Ralph L. Smead to Third Party Complaint in action number 31311.

8. Answer of third party defendant Joseph Lotz to Third Party Complaint in action number 31311.

9. Amendment to Answer of third party defendants American Fidelity and Casualty Company, Inc., a corporation, and The American Plan Corporation, a corporation, to Third Party Complaint in action number 31311.

10. Amendment to Answer in action number 31311.

11. Amendment to Complaint in action number 31311.

12. Statement of Points on Appeal by appellant, The Anglo California National Bank of San Francisco, a national banking association.

13. This designation of contents of record on appeal.

SEVERSON, McCALLUM & DAVIS

/s/ By NATHAN BERKE,

Attorneys for Appellant The Anglo California National Bank of San Francisco, a national banking association.

[Endorsed]: Filed March 9, 1955.

[Title of District Court and Causes 31311-31496.]

STATEMENT OF POINTS OF APPELLANT,
THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO

Comes Now, the above-named Appellant and states and specifies as the points on which he intends to rely in his appeal in the above-entitled cause, the following, to-wit:

1. The District Court erred in finding, holding and concluding that under the evidence plaintiffs had not sustained the burden of proving a conspiracy to defraud on the part of the defendants.

2. The District Court erred in refusing to credit the testimony of witnesses Smead and Lotz and their written statements.

3. The District Court erred in finding, holding

and concluding that the fundamental basis of plaintiffs' case is the written statements of Smead and Lotz.

4. The District Court erred in finding, holding and concluding that there was no trust relationship between defendant Joseph Lotz and plaintiff, Mid-States Insurance Company.

5. The District Court erred in finding, holding and concluding that plaintiff, The Anglo California National Bank of San Francisco (hereinafter referred to as the "Bank"), has no right of recovery against the defendants.

6. The District Court erred in finding, holding and concluding that plaintiffs' case rested solely on the theory of conspiracy.

7. The District Court erred in failing to find, hold and conclude that the defendants Lotz and Smead, and defendants American Federal and Casualty Company, Inc. and The American Plan Corporation through their agent Smead, had made misrepresentations to plaintiff, the Bank.

8. The District Court erred in denying plaintiffs' motion to modify the findings of fact and conclusions of law and to alter and amend the judgment.

9. The District Court erred in denying plaintiffs' motion for a new trial.

10. The District Court erred in entering judgment that plaintiffs take nothing by their complaints.

11. The District Court erred in failing to enter judgment for the plaintiffs as prayed for in their complaints.

Dated: March 8th, 1955.

SEVERSON, McCALLUM & DAVIS

/s/ By NATHAN BERKE,

Attorneys for Plaintiff-Appellant, The Anglo California National Bank of San Francisco.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 9, 1955.

[Title of District Court and Causes 31311-31496.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellants;

Complaint; Answer of Deft. Joseph Lotz.

Answer of Deft. Ralph L. Smead in action No. 31496.

Answer of Defts. American Fidelity & Casualty Co., Inc., et al in Cause No. 31496.

Complaint in Intervention in action No. 31496.

Answer of Defts. American Fidelity & Casualty Co., Inc., et al in Cause No. 31496.

Opinion in Cause No. 31496.

Findings of Fact and Conclusions of Law in Cause No. 31496.

Judgment in Cause No. 31496 (Consolidated with No. 31311).

Motion for new trial, for modification of Findings, etc. in Cause No. 31496 and 31311.

Order denying motions for new trial, etc., in Cause No. 31496 and 31311.

Notice of appeal by Mid-States Ins. Co. in Cause No. 31496.

Notice of Appeal by Anglo California National Bank in Cause No. 31496 and 31311.

Statement of Points by Mid-States Ins. Co. in Cause 31496.

Order for Transmittal of Original Exhibits in Cause 31496.

Stipulation obviating filing of further copies of reporter's transcript on appeal.

Cost bond on appeal of Anglo Calif. Nat'l Bank.

Cost bond on appeal of Mid-States Ins. Co.

Complaint in Cause No. 31311.

Answer of Deft. Anglo Calif. Bank in Cause No. 31311.

Third Party Complaint.

Answer of Third Party Defts. American Fidelity & Casualty Co., Inc., et al to Third Party Complaint.

Answer of Third Party Deft. Joseph Lotz to Third Party Complaint in Cause 31311.

Amendment to Answer of Third Party Defts.

American Fidelity & Casualty Co., Inc., et al to
Third Party Complaint in Cause No. 31311.

Amendment to Answer of Anglo Calif. Bank in
Cause 31311.

Amendment to Complaint by Mid-States Ins. Co.
in 31311.

Designation of contents of record on appeal by
Mid-States Insurance Co. in 31496.

Designation of contents of record on appeal by
Anglo Calif. Bank in 31311 with statement of points
attached.

Cost bond on appeal by Anglo Calif. Bank in
Cause No. 31311.

Eleven volumes of Reporter's transcript of trial.
Plaintiff's Exhibits Nos. 1 through 41, inclusive.
Intervening Plaintiff's Exhibits 1 through 5, in-
clusive.

Defendant's Exhibits A through G and I through
S, inclusive.

Defendant's Exhibit H for identification only.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
19th day of March, 1955.

[Seal] C. W. CALBREATH,
Clerk.

/s/ By WM. C. ROBB,
Deputy Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 31496

MID-STATES INSURANCE COMPANY, etc.,
Plaintiff,

vs.

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO, etc.,
Plaintiff in Intervention,

vs.

AMERICAN FIDELITY AND CASUALTY
COMPANY, INC., etc., et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

May 3 to 18, 1954

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiffs: Mid-States Insurance Company: Wallace, Garrison, Norton & Ray, by Maynard Garrison, Lewis Schimberg; The Anglo California National Bank of San Francisco: Severson, McCallum & Davis, by Almon McCallum, Nathan Berke. For the Defendants: American Fidelity and Casualty Company, Inc.: Bronson, Bronson & McKinnon, by E. D. Bronson, Harold McKinnon; Joseph Lotz; Peter Kakures, Richard Tiedeman; Ralph Smead: Pro Persona. [1*]

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Clerk: Mid-States Insurance Company vs. Anglo California National Bank, American Fidelity and Casualty Company, for trial.

Mr. Garrison: Ready for the plaintiff.

Mr. McCallum: Ready for the Anglo Bank.

Mr. Bronson: Ready.

The Clerk: Will counsel state your respective appearances, please.

Mr. Garrison: Mr. Lewis Schimberg and Maynard Garrison, of Wallace, Garrison, Norton and Ray, representing plaintiff Mid-States Insurance Company.

Mr. Berke: Nathan Berke, Almon McCallum of Severson, McCallum and Davis, representing the Anglo Bank.

Mr. Tiedeman: For defendant Joseph Lotz, Richard F. Tiedeman, Peter D. Kakures.

Mr. Bronson: For the defendants American Fidelity and Casualty Company, Incorporated, a corporation, and the defendant the American Plan Corporation, a corporation, the firm of Bronson, Bronson and McKinnon, and attending here at trial, if the Court please, Mr. Harold McKinnon and I, E. D. Bronson.

Mr. McCallum: Your Honor, Mr. Smead asked me to advise you, Mr. Ralph Smead, that he appears in pro per. He is sitting there behind the rail.

The Court: Proceed.

(Whereupon an opening statement was made by Mr. Garrison; reported but not transcribed.)

* * * * *

(Whereupon an opening statement was made by Mr. McCallum; reported but not transcribed.)

* * * * *

(Whereupon an opening statement was made by Mr. Bronson; reported but not transcribed.)

* * * * *

(Whereupon an adjournment was taken to 2:00 o'clock this day.) [4]

Mr. Garrison: I didn't understand whether or not counsel for Mr. Lotz decided to make an opening statement.

Mr. Berke: Your Honor, as one of the counsel for co-defendant Lotz, I would like to reserve our opening statement until such time as we put on our case. I might add that my associate and I came into this thing at a late date.

The Court: Very well.

Mr. Garrison: Call Mr. Hatfield as the first witness, Your Honor.

GERALD A. HATFIELD

a witness called on behalf of the plaintiff herein, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: Your full name, please? Be seated.

The Witness: Gerald A. Hatfield.

The Court: Where do you reside?

The Witness: Chicago, Illinois.

The Court: Your business or occupation?

The Witness: I am Vice President and General Manager of the Mid-States Insurance Company.

(Testimony of Gerald A. Hatfield.)

The Court: How long have you been so engaged?

The Witness: Since October, 1950. [5]

The Court: Prior to that time what was your activity?

The Witness: Prior to that I was Vice President of Mid-States in Charge of Underwriting.

The Court: For what period of time?

The Witness: Since 1946. I don't remember the exact month.

The Court: Prior to that?

The Witness: Prior to that I was employed with Mid-States as an underwriter and manager of their underwriting department, but no title.

The Court: Take the witness.

Direct Examination

Mr. Garrison: Does Your Honor prefer that counsel remain here, or may I be seated, sit at the counsel table?

The Court: I have no rigid rules here.

Mr. Garrison: Thank you. I didn't know whether Your Honor had or not.

Mr. Garrison: Q. Mr. Hatfield, since you have been Vice President of the Mid-States Insurance Company what, generally, have been your duties?

A. Do you mean since I have been General Manager, or just since I have been Vice President?

Q. Since you have been—well, let's start back, when you were General Manager. [6]

A. Well, since I have been General Manager

(Testimony of Gerald A. Hatfield.)

my duties have been to supervise the underwriting, the loss operations, and administrative operations of Mid-States.

Q. That includes supervision of agents of Mid-States, does it? A. Yes, sir.

Q. And when did you first assume those duties?

A. In October of 1950.

Q. And do you know Mr. Joseph Lotz?

A. I do.

Q. When did you first meet him?

A. I first met Mr. Lotz in July of 1950.

Q. Where? A. In Oakland, California.

Q. In that connection of business with Mid-States Insurance Company? A. Yes, sir.

Q. Was Lotz at that time an agent of the Mid-States? A. He was.

Q. Are you familiar with the contract that was originally entered into between the Mid-States Insurance Company and Mr. Lotz?

A. Yes, sir.

Q. You, however, did not negotiate that particular contract? A. No, sir. [7]

Mr. Bronson: Which one?

Mr. Garrison: That is the early 1947, first one.

Mr. Garrison: Q. I will show you a document, Mr. Hatfield, which is entitled "Agency Agreement with Endorsement to Contract By and Between Mid-States Insurance Company and Joe Lotz" dated May 15, 1947, and ask you if that is the

(Testimony of Gerald A. Hatfield.)

agency agreement that you referred to as being familiar with?

A. Yes, sir, this is the original contract.

Mr. Garrison: I would like to have this marked for identification, if I may, Your Honor, until such time as I can lay a proper foundation, unless there isn't any question in your mind.

Mr. Bronson: There will be no question.

Mr. Garrison: Then may it go in as Plaintiff's Exhibit 1 in order?

The Court: It may be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 1 admitted and filed in evidence.

(Whereupon Agency Agreement referred to and described above was admitted into Evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Garrison: Q. And under that contract how was Mr. Lotz operating in respect to his company's retained commission and the credit period allowed him? [8]

A. That contract is one which is known as a pure retrospective contract. Under the contract Mr. Lotz was obligated to remit to Mid-States Insurance Company one-hundred per cent of every premium dollar which he—for every policy that he wrote. The contract provided that Mid-States was entitled to retain twenty per cent of each premium dollar as it became earned to cover the home office expense and overhead cost, plus profit percentage for Mid-States.

(Testimony of Gerald A. Hatfield.)

The remaining eighty per cent of the premiums, as they became earned, were credited to Mr. Lotz' account. Out of that eighty per cent he was required to pay all losses under the policies, adjustment expense and whatever commission he paid to get the business.

Q. Did Mr. Lotz, as the agent, make his own adjustments for losses?

A. Yes, sir, he did.

Q. And you refer to that as a pure retrospective contract. How do you distinguish between pure retrospective and the other type?

A. Well, there are some types of—in other words, retrospective contracts which, although you get commission earnings, is dependent upon the contingent earnings, as this one is. There is also some cases of prepaid commission allowed to the agent.

Q. In other words, those terms refer to the variations in [9] the arrangements that are made with the different agents?

A. That is correct.

Q. And those contracts are, I assume, negotiated with the agents, are they, some agents being able to get a more favorable contract than others?

A. That is true, yes, sir.

Q. And how long did Mr. Lotz operate under that Exhibit 1 entered into in May of 1947?

A. He operated under that contract until September 1, 1951.

Q. Were there any modifications or changes in that contract?

(Testimony of Gerald A. Hatfield.)

A. Yes, there were changes from time to time under it.

Q. Are those changes shown by endorsement of the contract?

A. The contract was endorsed each time a change was made—not on this particular copy.

Q. What changes were made?

A. Well, the first change that was made was a change reducing Mid-States' net retention from twenty per cent to seventeen and one-half per cent.

Q. Well, now, what was the reason for making that change?

A. I had nothing to do with the change, so I can't tell you what the reason was.

Q. That occurred before your stewardship?

A. Yes.

Q. In other words, the effect of that change, I take it, was that the company retained less for its service and the [10] Agent Lotz received more for his?

A. That's right, he was given a two and one-half per cent greater potential earning, that's true.

Q. I see. And then what other change was made?

A. Then another change was made in May of 1951 whereby our retention was—no, I beg your pardon, there was another change prior to that where his retention was reduced to fifteen per cent—our retention, Mid-States's retention.

Q. In other words, he was given, in effect, another—

(Testimony of Gerald A. Hatfield.)

A. Another two and a half per cent added potential, yes, sir.

Q. Increasing his potential earnings?

A. That's right.

Q. That was an improvement to him insofar as his contract was concerned?

A. That's correct.

Q. And did you have anything to do with negotiating that change?

A. No, that was prior to my—

Q. That likewise was prior to your effective day.

Now, I will show you another document which is entitled "Agency Agreement with Mid-States Insurance Company", ask you if you will look at that and tell me if you are familiar with it, and what it is. [11]

Mr. Bronson: Isn't the endorsement, fifteen percent, changed on part of that Exhibit 1?

Mr. Garrison: I will ask him about that.

Mr. Bronson: Well, if it is, that is all that is required.

Mr. Garrison: I didn't actually notice.

The Witness: Yes, sir, this is a contract we entered into with Mr. Lotz on September 1, 1951.

Mr. Garrison: Q. This was a different arrangement from the one that you had with him previously?

A. Yes, it was a different arrangement.

Q. What was the difference?

A. Well, basically, it is still a retrospective contract, but this is one of the modified types I men-

(Testimony of Gerald A. Hatfield.)

tioned a moment ago wherein we allowed him a fifteen per cent prepaid commission in addition to his contingent commission.

Q. What retention did the Company have under that?

A. Under this contract, we retained fourteen per cent.

Q. In other words, you had, in those changes, reduced the amount of your charge for your service and increased his, and in addition to that, into this contract you allowed him to keep in advance fifteen per cent?

A. That's correct.

Q. In anticipation of his ultimately earning fifteen per cent?

A. That's correct. [12]

Q. And does that—are there any endorsements on that agreement?

A. Yes, there are two endorsements on here.

Q. What are those?

A. One is a rider containing a provision allowing him the fifteen per cent advance commission for a certain period of time. Another is a paragraph in the rider stating that he would write not less than \$25,000 per month in order to receive the retention of fourteen per cent. This also enabled him to appoint other agents directly for Mid-States Insurance Company if he so desired.

Q. I see.

A. Then the second rider is simply a formula showing how his contingent commission was to be computed.

Q. I see.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Does that answer your question, Mr. Bronson?

Mr. Bronson: I was referring to Exhibit 1.

Mr. Garrison: Oh, Exhibit 1.

Ask that this Agency Agreement be received in evidence as Plaintiff's Exhibit No. 2, being the document September 1, 1951.

The Court: Be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence. [13]

(Whereupon Agency Agreement dated September 1, 1951, was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Garrison: Q. When had you first started supervising Mr. Lotz' agency operation?

A. In October of 1950—Yes, 1950, that is correct.

Q. And had you had a record of his business transactions for the period since 1947?

A. Yes, we had a record.

Q. Those are kept in the office as a customary part of your accounting procedure?

A. That's correct.

Q. You knew what he had written in the years previously, did you? A. Yes, sir.

Q. What his loss ratio was?

A. Yes, sir.

Q. And what profits he had made out of his operation? A. Yes, sir.

Q. Now, during the time that you supervised

(Testimony of Gerald A. Hatfield.)

that agency, did you do so from—Well, withdraw that.

Where was your office at that time?

A. In Chicago, Illinois.

Q. And how did you carry on your work of supervision of the offices throughout the country?

A. Well, I supervised our outside agents by personal contact, by telephone and by correspondence.

Q. And in what states did your Company write insurance?

A. Well, our Company was licensed in twenty-eight states.

Q. So that you made your trips to the various states periodically and the rest of the time you contacted them by phone and letter?

A. That's right. I tried to call on the agents personally at least twice a year.

Q. We have referred to the retrospective plan here, and I wonder if you could review for us just briefly again how the retrospective plan of underwriting differs from other methods of carrying on the insurance business?

A. Well, the retrospective plan differs basically because the agents' commission is entirely contingent upon the loss experience on the business which he writes. This differs from the usual agent's contract, or the usual agent's plan, in that an agent is guaranteed a certain percentage of commission based upon the written premiums. But under the retrospective there is no guarantee, and also commissions are computed rather than on written pre-

(Testimony of Gerald A. Hatfield.)

miums at the time the policy is written, under the retrospective the commissions are computed as the premium becomes earned.

Q. In other words, the average, normal, or common arrangement where the local agent represents an insurer, he gets his [15] commission when he first writes the business? A. That's correct.

Q. Is that true? A. That's correct.

Q. And under this plan, he doesn't get his commission until the business has matured and there has been demonstrated that there is a commission earned? A. That's correct.

Q. If the loss ratio happens to be high, it is conceivable he wouldn't receive any?

A. That is correct.

Q. And if it is abnormally low, he would receive much more than the average normal local agent?

A. Yes, sir.

Q. I take it the agent under the retrospective plan pays his own overhead and operating costs?

A. He pays all expenses, yes, sir.

Q. What else does he have to pay?

A. He pays whatever advance commissions he pays to brokers to secure the business.

Q. In other words, he must pay the sub-agent funds to begin with—

A. If he makes that arrangement with the sub-agent, yes.

Q. Now, do you know what the volume of insurance was that Mr. Lotz wrote the first years of this connection with the [16] Mid-States?

(Testimony of Gerald A. Hatfield.)

A. Well, he began in May of 1947, and his volume during that time was very low.

Mr. Bronson: Wait a minute. I am going to object. He hasn't answered the question. He was asked if he knows, it is a foundational question.

Mr. Garrison: Q. Do you know?

Mr. Bronson: I might want to inquire what his knowledge is based upon.

The Court: You may answer yes or no.

Mr. Garrison: Q. Do you know what his volume was with the Company in the first years that he was appointed? A. Approximately, yes.

Q. Will you tell us what volume of business Mr. Lotz developed as an agent of Mid-States beginning in May of 1947?

Mr. Bronson: Wait a minute. I will object to that; it may be hearsay, it may be a conclusion, might be anything. I would like to have some foundation.

The Court: Do you know that of your own knowledge?

The Witness: I don't know definitely, no, sir. I have records I could refer to.

The Court: Are they records here and available?

The Witness: The records aren't here today.

Mr. Garrison: Q. Well, let me ask you, were those records a part of the books and records of account of the [17] Mid-States Insurance Company? A. Yes, sir.

Q. Did you have those in your charge and custody while you were there as supervising manager?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

The Court: Was that in 1947?

The Witness: I beg your pardon, weren't in my charge in 1947, no.

Mr. Garrison: Q. Now, when you came there?

A. That is right.

Q. They were part of the permanent records of the Company, were they?

Mr. Bronson: Mr. Garrison, with your method of examination, it makes it very difficult, the witness has done very little testifying, and I think they have been very leading questions.

The Court: He suggests these are leading questions, Counsel.

Mr. Garrison: Well, I am trying to lay a foundation.

Mr. Garrison: Q. Just tell us then, where you, what information you base your statement that you know generally what his writings were from the first policy he wrote for the Company—where did you get that information?

The Witness: From our accounting department.

Mr. Garrison: Q. And where are they located?

A. In Chicago.

Q. And where would they get the information?

A. They would get the information from the business as it was submitted by Joe off the daily reports.

Q. Mr. Lotz, you mean?

A. Mr. Lotz, excuse me.

(Testimony of Gerald A. Hatfield.)

Q. And were those records kept in the office as part of their records?

A. In our office?

Q. Yes. A. Yes, sir.

Q. And did you have an access to those as part of your duties in supervising the agencies?

A. Yes, sir.

Mr. Garrison: It seems to me, Your Honor, that those are part of the Company's official records which he used in supervising the agencies, be part of his duties to refer to them and be familiar with them.

The Court: Nothing before the Court.

Mr. Garrison: I beg your pardon?

The Court: There is nothing before the Court.

Mr. Garrison: Thank you.

Mr. Garrison: Q. Tell us, Mr. Hatfield, what premium volume did Mr. Lotz develop from the year 1947 on up to 1950? [19]

Mr. Bronson: I am going to object, no foundation laid, calls for hearsay. These are records that we have never seen, or that were submitted to us, Your Honor. We have had certain records submitted to us, it is quite true, and having had a chance to examine those we make no objection.

The Court: He is entitled to those records.

Mr. Garrison: I beg your pardon?

The Court: He is entitled to the record, which is the best evidence.

Mr. Garrison: Very well, I think the record would be the best evidence.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Q. Now, then, Mr. Hatfield, after you went with Mid-States Insurance Company and began the function of assuming the supervision of the agencies, and Mr. Lotz, were you personally acquainted with the volume of business that Mr. Lotz developed for the company? A. Yes, sir.

Q. And what did you say was the date that you first started supervising Mr. Lotz' writings?

A. In October, 1950.

Q. And what was the premium volume developed by Mr. Lotz in 1950?

A. His average monthly premium volume was approximately fourteen or fifteen thousand a month.

Q. What was the condition of Mr. Lotz' account with Mid-States [20] Insurance Company during 1950 with respect to being current?

A. It was current.

Q. And how were his payments made in respect to the due dates as they came due?

A. Well, his payments were made sometimes late, but never late enough to become alarmed.

Q. In other words, the accounts were paid when they became due, although sometimes tardy?

A. That's right.

Q. And did it require occasional follow-up letters?

Mr. Bronson: Same objection, it is leading the witness, if Your Honor please.

Mr. Garrison: Withdraw the question.

Mr. Garrison: Q. Did you have occasion to cor-

(Testimony of Gerald A. Hatfield.)

respond with him regarding the payment of his account?

A. I didn't personally, but my accounting department or underwriting manager did.

Q. And that had to do with the due date and the date of payment? A. That's right.

Q. When did you first learn that Mr. Lotz had entered into any kind of a transaction with the Public Service Insurance Company in connection with the Mid-States business?

A. The latter part of November, 1951.

Q. The latter part of November in 1951. And did you [21] investigate that transaction after you had first knowledge of it?

A. I beg your pardon, sir, that was incorrect. Will you restate your question again?

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

A. That answer should be the latter part of September, 1951.

Mr. Garrison: Q. Latter part of September, 1951. And did you thereafter investigate and inquire regarding that transaction? A. I did.

Q. And did you find—what did you find with respect to whether or not the business had already been written in the Mid-States Company before you had notice of it?

A. I found the policies had been written and issued.

Q. By Mr. Lotz?

A. By Mr. Lotz' office, yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. Now, in your supervision of these agencies, including Mr. Lotz', do you have under these contracts any control over the business that they underwrite?

A. We have underwriting control, yes.

Q. What do you mean by that?

A. I mean we supervise the agent, what type of business he should write under the contract in order to make money under it.

Q. Is that provided for in this agency agreement? [22]

A. I couldn't state whether—

The Court: Here it is (indicating).

Mr. Garrison: May I see that, Your Honor?

Mr. Garrison: Q. I wonder if you would look at the agency agreement referred to as Plaintiff's Exhibit 2, tell me whether or not there are any provisions in there relating to underwriting control by Mid-States?

A. No, I don't see anything in here giving us specific underwriting control.

Q. Do you provide, is that in your discussions with the agent?

Mr. Bronson: That is a leading question, if Your Honor please. The witness can hardly squirm out of the answer suggested, and I again object.

The Court Objection sustained.

Mr. Garrison: Q. Did you actually, as a matter of fact, exercise underwriting control with Mr. Lotz? A. Yes, we do with all agents.

(Testimony of Gerald A. Hatfield.)

Q. And what does that mean, "underwriting control"?

A. That means we check the type of risk he is writing to see what kind of business he is submitting to us.

Q. We referred this morning to sub-standard business. Would you tell the Court what you mean by sub-standard business?

A. Well, sub-standard insurance risk is dependent upon several factors. One factor is the age of the driver; another factor could be the nationality extraction of the driver; [23] another factor is the occupation of the insured; still another factor might be who the mortgagee is named in the policy; other factors are relating to the type of coverage written for a certain type of automobile. Other factors are rates that are used.

Q. In other words, the presence or absence of some or all of those conditions determine the class of business that is involved?

A. That is correct.

Mr. Bronson: That is a recapitulation and interpolation and a suggested answer, and we object on those scores.

The Court: Read the question and the answer.

(Record read by the reporter.)

The Court: I will allow the question and answer to stand; the objection will be overruled.

Mr. Garrison: Q. And does the fact of business being sub-standard necessarily control whether it can be underwritten profitably or not?

(Testimony of Gerald A. Hatfield.)

A. That's correct.

Q. And how are rates, if at all, adjusted to meet the conditions of the assured?

A. Well, the agent has no power to adjust rates.

Q. No, I don't mean the agent, I mean the insured. A. The insurance company?

Q. Yes. [24]

A. The insurance company sets its rate schedules up on the basis of past experience for any given coverage.

Q. And you had a different scale for different kinds of business, whether it is standard or sub-standard?

A. In some cases that is entirely possible; in other cases we don't.

Q. And did Mr. Lotz have a scale for sub-standard business?

A. At one time he had a scale for sub-standard business.

Q. Does your company accept sub-standard business ordinarily?

A. Ordinarily we will accept it in a limited capacity.

Q. What do you mean by that?

A. I mean by that we will not permit an agent to write nothing but sub-standard business with us. In fact, we insist upon a preponderance of standard risks before we accept sub-standard.

Q. But you do expect a certain percentage of sub-standard business and those figures enter into your job in the supervision of the underwriting?

(Testimony of Gerald A. Hatfield.)

A. That's right.

Q. And how do you do that in relation to a given agent's business?

A. Check the daily reports that he has been sending in into the home office.

Q. Those daily reports are what?

A. A daily report is a copy of the policy which he has issued in each case. [25]

Q. When do you receive that in relation to when——

A. Supposed to receive it on a daily basis. In other words, the agent is supposed to mail them the same day he issues the policy.

Q. Your function is to review those?

A. It isn't my function any more.

Q. But I mean at the time we are discussing?

A. That's right.

Q. Now, you say in the latter part of September you received these Public Service dailies?

A. That is correct.

Q. 1951? A. Yes, sir.

Q. And in what numbers did you receive them?

A. As I recall the first group that came in were between six and seven hundred.

Q. Six and seven hundred?

A. Daily reports, that's right.

Q. Did they show when they had been written up? A. Yes, sir.

Q. When had they been written up?

A. In the early part of September, 1951.

(Testimony of Gerald A. Hatfield.)

Q. And on the same day? All of them on the same day?

A. No, the writing dates varied. I think they were all written within a period of a week or ten days. [26]

Q. But they arrived in your office in one bunch?

A. That is correct.

The Court: Did I understand 700?

The Witness: Six or seven hundred, somewhere between there.

Mr. Garrison: Q. And what did you do?

A. Well, as soon as I saw them I became rather excited about it, because it was the first time we had ever received such a volume of business in one group from this agent. So that night I took these six to seven hundred daily reports home with me and personally scanned through them to see what kind of business it was.

Q. What did you find?

A. Well, I found that there were so many violations of our underwriting policy and rates, our general policy of operations, that I thought it necessary to get hold of Mr. Lotz at once.

Q. What did you do?

A. The next morning I tried to locate him by telephone, but I was unable to locate him.

Q. Then what did you do?

A. Then I sat down and wrote him an airmail letter.

Q. And did you review in the letter the discov-

(Testimony of Gerald A. Hatfield.)

eries you had made the night before in the analysis of the dailies? A. I did.

Q. Then after that letter what occurred in connection with [27] this subject?

A. Well, after that letter the telephone company finally located Mr. Lotz about a week later in Santa Barbara, California, at which time then I discussed the whole matter with him.

Q. What was that conversation?

A. Well, that conversation—

The Court: Lay the foundation for it. Has the foundation been laid?

Mr. Garrison: Q. In Santa Barbara, and do you know the date?

A. I think it was October 5.

Q. October 5, and it was between you and Mr. Lotz? A. That's correct.

Q. Would you tell us the conversation?

A. Yes, in that conversation—I am more or less repeating what I had said in my letter of September 28—but I asked some additional facts as to why he would take the business and what he thought about it.

He told me that he had taken the business because he had previously had a similar group of business on which he had made money. I asked him if he had been paid the premiums for the business, and he said yes. I asked him if he had received all of it, to which he replied yes.

Then I told him that I thought that it was very bad [28] judgment on his part for accepting such

(Testimony of Gerald A. Hatfield.)

business, and that he would have to make numerous changes in the policy if we were to allow them to continue in force.

Q. Then did you have any subsequent conversation with him, or correspondence?

A. Well, he immediately replied to me by air-mail letter, I think on—no, again I wrote to him, I beg your pardon, again wrote to him on October 8 setting forth additional facts that—and duties that he would have to perform to change the policies so as they would conform to our underwriting standards and also they would conform to the rates we were using in the state at that time.

I pointed out in that letter, too, I believe, that there were certain risks that I insisted he cancel immediately, and I also asked him in that letter as to what commission he had paid for the business.

Q. Your first letter you said was September 28?

A. I believe that's correct.

Q. And the second was October 8, is that correct?

A. That's right.

Mr. Garrison: You have copies of that, I believe, Mr. Bronson.

(Colloquy between counsel inaudible to the reporter.)

Mr. Garrison: Q. I show you a copy of a letter dated September 28, and ask you if that is the letter that you [29] referred to that you wrote Mr. Lotz?

A. Yes, sir, this is it.

Mr. Garrison: I ask that this be received in evidence as Plaintiff's Exhibit 3.

(Testimony of Gerald A. Hatfield.)

The Court: Be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 3 admitted and filed in evidence.

(Whereupon document, letter dated September 28 to Mr. Lotz was received in evidence and marked Plaintiff's Exhibit 3.)

Mr. Garrison: Q. I will show you a letter dated—a copy of a letter dated October 8 and ask you if you will tell us what that is.

A. This is a copy of the letter I wrote Mr. Lotz on October 8.

Mr. Garrison: I ask that this be received as Plaintiff's Exhibit 4.

The Court: That may be marked in evidence.

The Clerk: Plaintiff's Exhibit 4 admitted and filed in evidence.

(Whereupon document, letter dated October 8 Mr. Lotz was received in evidence and marked Plaintiff's Exhibit 4.)

The Court: I think it might be well to have them read in evidence. [30]

Mr. Garrison: I didn't hear your Honor.

The Court: I think it would be well to read them into the record so I will know what they are at this time.

Mr. Garrison: Thank you. The September 28 letter is as follows:

(Testimony of Gerald A. Hatfield.)

“September 28, 1951, Air Mail, Mr. Joe Lotz, 315 Fourteenth Street, Oakland, California.

“Re: Public Service Company Rewrites.

“Dear Joe:

“It certainly looks to me like someone has been ‘pulling your leg’ in getting you to accept the business which the Public Service Company canceled. I do not believe you were close enough to the picture to realize what has happened and after reviewing the group of daily reports which we have just received, I am going to try and point out below that which seems like glaring evidence that someone is taking advantage of you.

“In the first place, Joe, these rewritten policies in Mid-States have not been written under our current rate schedule. We have computed the pro-rata premium which would apply in several of the daily reports and none of them agree with our figures. Also, it is very obvious that our present rate chart was not followed because many of these policies are written for \$15 [31] deductible fire and theft. Our present rate chart makes no provision for this coverage whatsoever. So how can anyone tell you that these policies were written under our existing rate chart. Joe, I am sure you can realize that this is something that must be corrected at once. I cannot afford to let these run through and run the risk of being criticized or condemned by the California Insurance Department. So I trust you will take immediate steps to endorse these policies to the

(Testimony of Gerald A. Hatfield.)

proper rates and coverages which are permissible under our rate chart.

“Secondly, at least 60 per cent of this business covers sub-standard risks from the standpoint of either age, race, or occupation. To me, this makes it very obvious what public service was trying to do which was purely and simply get rid of some of the business which causes them their losses. If this was not the reason then how on earth could there be such a high ratio of sub-standard risks to standard risks. It is my belief that if you continue on these risks they will not make any money for you, but, on the other hand, I would be willing to bet you a new suit that you would end up in the hole on this group of business. Joe, I think you should give this very serious thought and it may be that such thought will change your mind about keeping this [32] business at all. You know as well as I do that volume alone does not make you money—but volume coupled with high quality business will make you a lot of money.

“Another thing that substantiates my belief that you are being given the cats and dogs is that I have noticed several risks where the mortgagee is Commercial Credit Corporation, Pacific Finance Company and the Bank of America. Joe, each one of these finance companies have insurance carriers of their own and if the business was desirable you couldn't pry it away from their own insurance carriers. I have had enough experience with this to know what I am talking about because our own

(Testimony of Gerald A. Hatfield.)

parent company, G.F.C., follows the same practice in their efforts to protect and maintain a low loss ratio with us.

"If I seem to be a little disturbed by my remarks above it is only because I consider you a very good friend and I am trying to protect your interests. Any remarks above while they may be worded rather strongly are meant only as constructive criticism and there is absolutely no intent to ridicule you. Please let me have your reaction to the above and your comments as quickly as possible. Best regards.

"Yours very truly, Gerald A. Hatfield, Vice-President."

The letter, October 8, 1951, Air Mail: [33]

"Mr. Joe Lotz, 315 Fourteenth Street, Oakland, California:

"Dear Joe:

"I certainly appreciated your calling me Friday and telling me that you issued orders to your office that all policies issued in the rewriting of Public Service business must be changed to the present Mid-States rates. It is my understanding that your office will begin making these changes immediately on all such policies with the possible exception of policies which have already expired or are due to expire within the next few days. I would like to suggest that you take one further step while making these changes and that is that the collision

(Testimony of Gerald A. Hatfield.)

coverage on all substandard risks should be changed to \$100 deductible. I honestly believe that this change is just as necessary as securing the proper rates in order that both you and Mid-States can make money on this group of business. Also remember that every policy which is now written for deductible, comprehensive or fire and theft must be eliminated because our present rate chart does not provide for this coverage on a deductible basis.

"I am also requesting that you cancel immediately all policies in this group which show a loss payable clause to Commercial Credit, Pacific Finance and Universal CIT. All policies which have loss payable [34] clauses to these firms are strictly low substandard risks otherwise they would have been written in these companies' own insurance carriers. I do not want Mid-States to gain a reputation of writing this kind of business when their own carriers will not write it. I do not believe that you will find that by complying with this request that you will have a great number of cancellations to effect. The number of such policies is relatively small, but, regardless of that fact, we should not write a single policy for these companies.

"I note that on many policies you have attached special endorsements such as a named insured endorsement and a California restriction endorsement. I would like to know what class of risk carry these endorsements and I want you to be absolutely sure that every single policy issued on that class carries

(Testimony of Gerald A. Hatfield.)

the same endorsement. If you do not make certain of this then we will be guilty of discrimination again in the eyes of the insurance department and we cannot stand another chance of this kind. I would much prefer to eliminate all such endorsements entirely rather than run the risk of being guilty of discrimination. I understand that Kledzik and Oldberg are coming to Oakland tomorrow night. I am glad to hear this because they can give you a great deal of assistance in cleaning up this situation. [35]

"I am wondering, Joe, what kind of commission you paid to get this group of business. Truthfully, I don't see why you would have to pay any commission because it appears to me that you have helped the Public Service Company out of quite a mess. If you did have to pay a commission I think you should set it up strictly on a contingent basis with any payment being held off until the business has completely run off.

"I hope you will pardon my being so blunt but I still feel that somebody sold your office a "bill of goods". I hope you will instruct Smead that before he ever again agrees to a deal of this kind that he will not only have your personal okay but that you will contact me before giving your approval so that we can discuss all angles of the deal before going into it. I certainly wish I could be out there to assist you too but I know you will

(Testimony of Gerald A. Hatfield.)

straighten the situation out as fast as possible. Best personal regards.

“Yours very truly, Gerald A. Hatfield, Vice-President.”

Mr. Garrison: Q. Now when you wrote that letter—those letters, had you received all of the Public Service dailies? A. No, some.

Q. Some came in after?

A. Some came in after that, yes, sir. [36]

Q. Had you any knowledge at that time that Lotz was in any kind of financial difficulties?

A. No, sir.

Q. In reference to retaining some of the Public Service business in those letters, was it your expectation that you would ultimately be paid premiums on that business? A. Yes, sir.

Q. Were you ever paid the premiums on it?

A. No, sir.

Q. Do you know how many policies were involved altogether in that Public Service so-called re-write?

A. In the neighborhood of 1,800 to 2,000.

Q. You received the balance of the dailies after this first bunch of six or 800? A. Yes, sir.

Q. Did you have a visit from Mr. Lotz sometime during the month of August in 1951 in Chicago?

A. Yes, sir, he came to Chicago on August 15, 1951.

Q. That was before this occurrence?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

Q. We were just talking about?

A. Yes, sir.

Q. Did you have a conversation with him there?

A. Yes, sir.

Q. Where? [37]

A. In my office and also in Mr. Titus' office.

Q. Who else was present?

A. Mr. Titus and myself.

Q. Mr. Titus, who is he in relation to Mid-States?

A. In relation to Mid-States, he is president of Mid-States.

Q. He is the gentleman in the courtroom?

A. Yes, sir.

Q. And what was said by you and what was said by Mr. Lotz in relation to his relationship to you and the American Fidelity and Casualty Company?

A. Well, Mr. Lotz came in and wanted to know if we would be interested in entering into a new contract with him. He said that he was fed up with the way he was being treated by American Fidelity and the American Plan Corporation, and that if we would give him a contract anywhere along the lines he wanted he would be glad to come back to Mid-States.

Q. By the way, had he changed the volume of business that he had been writing with you prior to that?

A. Prior to August 15, you mean, sir?

(Testimony of Gerald A. Hatfield.)

Q. Prior, yes.

A. Yes, his volume of business with us prior to August 15 had dropped to zero in one or two months and very low in other months.

Q. When did that start? [38]

A. That started really in January or February of 1951.

Q. You know of your own knowledge that he made a contract with the American Fidelity and Casualty Company and American Plan at about that time?

A. Yes, sir.

Q. And do you know when that was he made that arrangement?

A. No, I don't know the exact date. I think it was in January.

Q. Your business with Mr. Lotz was changed as of about January?

A. You mean our business from the standpoint of volume?

Q. Yes. A. Yes.

Q. And what was the change in January of '51 on down to this date in August?

A. Well, our volume from January, 1951, dropped sharply until August of 1951.

Q. So that you practically were doing no business with him at this time in August at all?

A. That's right.

Q. And then you had this conversation, and go ahead with it and finish it.

A. Well, he said he wanted to come back to Mid-States and be one hundred per cent representa-

(Testimony of Gerald A. Hatfield.)

tive of ours and he asked for a contract, a new contract wherein we would give him [39] a 15 per cent advance or prepaid commission.

Well, during the conversation we agreed upon other points as to the term of credit. We told him we would give him sixty days term of credit, and also told him we would give him the power to appoint other agents direct for Mid-States as he saw—wanted it. Also agreed upon the minimum premium volume he was to receive if we were to give him a retention of 14 per cent, which he had asked for, and as a result of all these points we discussed amongst the three of us, we agreed upon the contract which was finally drawn on September 1.

Q. That is the one you have in your hand?

A. Yes, sir.

Q. Plaintiff's Exhibit 2. And that was a more favorable contract as far as Mr. Lotz was concerned than any you previously had had?

A. That's correct.

Q. Did he say anything at that time about his reasons for discontinuing with the American Plan or American Fidelity?

A. Yes, he said he was tired of the kind of treatment they were giving him, made many promises that they hadn't lived up to.

Q. He didn't say anything about American Plan or American Fidelity cancelling themselves this contract?

A. No, he did not.

Q. Did he tell you anything about his financial condition? [40]

A. No, sir.

(Testimony of Gerald A. Hatfield.)

Q. Did he say anything in that meeting in August about the prospect of this Public Service deal?

A. No, sir.

Q. Did he tell you that he had previous, just immediately prior to that time been in New York with the American Plan and American Fidelity officials?

A. No, sir.

Q. Did he mention having seen Mr. Hart just the day before?

A. No, sir.

Q. How had you arranged your appointment with Mr. Lotz on that occasion?

A. Well, it was arranged by telephone from Mr. Lotz.

Q. Did you talk to him?

A. No, my secretary did.

Q. Does that substantially complete the conversation of August 15, 1951, with Mr. Lotz?

A. That is about all I can remember pertinent to the contract. Of course, we had a lot of conversation.

Q. I know, I mean the pertinent portion.

A. Yes.

Q. And subsequently this contract was completed and sent to him, was it?

A. That's correct.

Q. Now, when did you first hear from anyone, or when did [41] you first have your conversation with anyone regarding the Public Service rewrites, so-called?

A. Well, the first conversation I had with anyone would be the telephone call from Mr. Lotz,

(Testimony of Gerald A. Hatfield.)

or where I was trying to locate Mr. Lotz, finally located him in Santa Barbara on October 5.

Q. That's the one you have already described?

A. Yes.

Q. After you had that conversation and you dispatched these letters, what did you do in connection with Mr. Lotz' affairs?

A. I don't hardly know what you are driving at.

Q. Well, did you get some further information from someone regarding Mr. Lotz' affairs shortly after you wrote these letters?

A. We had received notice from the Insurance Department of the State of California that they were suspending Mr. Lotz' license.

Q. Not in connection with the Public Service transaction? A. No.

Q. Had you gotten reports from anyone else about Mr. Lotz' affairs, and about this time? If you don't recall, I believe you did go to Oakland shortly after this October——

Mr. Bronson: I don't hear your question.

The Court: He is reframing the question. [42]

Mr. Bronson: I didn't hear the question.

Mr. Garrison: Q. My question has to do now with whether or not you made a trip from Chicago to Oakland in connection with Mr. Lotz' affairs?

A. Yes, I went from Chicago to Oakland on November 23rd.

Q. And does that refresh your recollection regarding having had reports from anyone prior to your going to Oakland? A. Yes, it does.

(Testimony of Gerald A. Hatfield.)

Q. I don't want you to tell us what the reports were, but did you get reports from someone?

A. That's correct.

Q. Who were they?

A. From Mr. Oldberg.

Q. Who is he?

A. Mr. Oldberg was our resident vice-president, located in Los Angeles.

Q. You had a conversation with him about Mr. Lotz? A. That's correct.

Q. Had he been to Oakland himself before calling you? A. Yes, sir.

Q. All right. Now, then, you went to Oakland then immediately?

A. He called us—he called me on the, I think, about the 20th of November.

Q. When did you go to Oakland? [43]

A. I went to Oakland on November 23.

Q. Who did you see there?

A. Well, I saw Mr. Oldberg and Mr. Kledzik, and I saw Mr. Lotz and Mr. Smead, Mr. Lotz' attorney at that time, Mr. Mead.

Q. Mr. William Mead of Oakland?

A. That is correct.

Q. Did anyone accompany you to Oakland from Chicago?

A. Yes, our staff counsel accompanied me, Mr. Frank Czar.

Q. Is that C-z-a-r? A. Correct.

The Court: Take a recess.

(Short recess.)

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Q. Mr. Hatfield, I was just about to ask you a question regarding your trip out to Oakland from Chicago before we recessed. Before we get out to Oakland, I would like to ask you one or two other questions. What was the condition of Mr. Lotz' account with Mid-States during this period that you have been referring to, September and October? A. It was current.

Q. When you wrote those letters to him?

A. Yes, sir.

Q. Now, during that period did you have a conversation on the telephone with Mr. Hart, the president of the American Plan Corporation? [44]

A. I had a conversation with Mr. Hart on either October 31 or November 1, I don't know which.

Q. Was that before or after you went out to Oakland? A. That was before.

Q. And how did that call come about, what date was it and what was said?

A. Well, it will have to go back to about October 30, Ralph Smead of Mr. Lotz' office called me from Oakland and asked me if I would entertain the proposition of rewriting a group of business which he had already written with the American Fidelity.

Q. Which he, Lotz' office, had written with the American Fidelity? A. That's correct.

Q. Now, this subject is disassociated from the Public Service transaction, is it?

A. Entirely separate and apart from it, yes.

Q. This is another transaction entirely?

(Testimony of Gerald A. Hatfield.)

A. Yes.

Q. All right.

A. In the conversation he stated that he would like for me to rewrite a certain group of business, I think he told me at that time approximately \$60,000 worth of policies that he had issued in the month of August and September of [45] 1951. He stated that they were so upset with American Fidelity, the way they had been treated, he wanted to take the business out of them and give it to us. I wasn't too——

Q. No, just what was said. You can't give your emotional reactions.

A. Well, I think then he gave me some of the facts involved. I don't recall the exact conversation except that I did ring off by telling him I would take it under consideration, I made no commitment whatsoever.

Q. That was the conversation with Mr. Smead?

A. Yes, I believe he did ask me in his conversation that if I agreed to take it over that I should please contact Mr. Mark Hart of the American Plan Corporation and advise him accordingly, that he had already talked to Mr. Hart and secured Mr. Hart's approval to effect the rewrite if we agreed to it.

Q. That was the end of that conversation with Mr. Smead? A. Yes, sir.

Q. Then did you have a conversation that I have asked about with Mr. Hart?

A. Well, before having the conversation with

(Testimony of Gerald A. Hatfield.)

Mr. Hart there were one or two telegrams between Mr. Smead and myself. I wired him on one occasion asking for additional particulars, and also told him that in one telegram that if I would agree to take it on that we would not allow the fifteen per cent [46] prepaid commission on that group of business, and I think I received a reply from him concerning it. Then following those telegrams was when I received a call from Mr. Hart in New York.

Q. And that was—you gave us the date, give it to us again?

A. It was either October 31 or November 1.

Q. What was said by you and what was said by Mr. Hart?

A. Well, Mr. Hart called me and told me that he understood that I had been talking to Ralph about rewriting a group of business that had been issued in American Fidelity, and I told him yes. He told me that he thought it would be a favorable deal for us, and I was rather dubious about it until he made the statement that, of course, we would not take over any losses, then he would see to it that no policies rewritten with us on which there had been reported losses, and that, of course, interested me much more.

Mr. Hart stated in his conversation that if we would agree to take over the business it would be rewrite and not a reinsurance deal, and that I would have to look for Joe Lotz for payment of the premiums. I asked him if Joe Lotz was broke, or if

(Testimony of Gerald A. Hatfield.)

he knew Joe Lotz was broke, and I think he replied in the negative.

Mr. Bronson: I am going to ask that go out. I don't think the Court would be interested in the gentleman's thoughts, [47] the part that he said "I think he replied in the negative."

Mr. Garrison: Q. That is your best recollection?

The Court: Pardon me just a moment.

Mr. Bronson: There was an objection.

The Court: The answer was "In the negative." Give the conversation.

Mr. Garrison: Yes, give us your best recollection of the conversation. If you don't know, say, "I don't recall." You don't have to give the exact words, you can give the substance.

A. Much was made of the fact that the reason why American Plan was permitting Mr. Lotz to rewrite this business was because of our advance commission contract with him, and it was stated that they could not meet the contract and if Joe could make a deal with us on that basis they were willing to relinquish their rights on the business.

I asked Mr. Hart in the conversation if they had kicked Mr. Lotz out as an agent, and they said no, definitely not. That, I think, is about the sum total of the conversation.

Mr. Garrison: I believe, if the Court please, that that conversation was recorded by some recording device at the receiving, at Mr. Hart's end of the line and counsel has, under our notice to

(Testimony of Gerald A. Hatfield.)

produce, furnished us with a transcript of that conversation, and I would like to ask counsel to produce it now. [48]

Mr. Bronson: You have a copy, haven't you? You want the record, you mean?

Mr. Garrison: No, just the transcript.

Mr. Bronson: We gave you a copy.

Mr. Garrison: I don't seem to have a copy now.

(Colloquy between counsel inaudible to the reporter.)

Mr. Garrison: While we have the conversation recorded, in keeping with these proceedings, we might as well have it read.

The Court: You have overcome the difficulties by stipulation?

Mr. Garrison: There is no——

Mr. Bronson: Counsel brought the subject up, so we would be entitled to bring it in. Your Honor, I have briefed this thing, and there is no question about any legality of taking down a conversation of this kind.

Mr. Garrison: We are not raising any point of illegal monitoring, if the Court please.

Mr. Bronson: You would do it unsuccessfully. I could say to Your Honor we tried to run this process with the machine and then we found out that the Audograph people have their own equipment for slowing down, and then some girl, professionally and legally, takes those things, and this will be her transcript. We had the thing prepared

(Testimony of Gerald A. Hatfield.)

that way, and the record itself, the disc, is in our possession. [49]

Mr. Garrison: If Your Honor will permit me I would like to read this conversation into the record.

The Court: No objection?

Mr. Bronson: I would like to have it admitted as an exhibit before you do it, because——

Mr. Garrison: I will do it—I will introduce it afterward, and I will ask Mr. Hatfield if this is the conversation just referred to. This is described on the transcript here as a telephone conversation, Mark Hart and Gerald Hatfield, October 31, 1951.

“Telephone conversation

Mark Hart and Gerald Hatfield

October 31, 1951

Hatfield: Hello.

Hart: Jerry?

Hatfield: Yes.

Hart: Mark Hart.

Hatfield: Hello, Mark.

Hart: How the hell are you?

Hatfield: Just fine.

Hart: Long time—I understand you called me a long time ago—I was out of town, or something.

Hatfield: Yeah.

Hart: Jerry, you're going to be at the conference, aren't you? [50]

Hatfield: Yes, sure.

Hart: Yeah, well, I'll see you there. Let me ask you this—I understand from Ralph Smead of Joe

(Testimony of Gerald A. Hatfield.)

Lotz' office that he had some conversation with you about a rewrite?

Hatfield: Yeah.

Hart: Now, frankly—undoubtedly what they're thinking about is this. With us, you know, they have no prepaid commission.

Hatfield: Uh, huh.

Hart: And they tell us that their deal with Mid-States gives them a fifteen per cent prepaid commission, so it's somewhat to his advantage to be able to rewrite this stuff. He's asking me if he could write it flat—he can't cancel flat.

Hatfield: Yes.

Hart: And I've said 'yes' and particularly so—and very frankly, Jerry, that he hasn't paid us for the premiums.

Hatfield: (Laughter)

Hart: He's told you that, I believe.

Hatfield: Yes. How old is it?

Hart: September.

Hatfield: September.

Hart: September, and there's some August. But [51] you see, the September business is not due under our contract—we have seventy-five days.

Hatfield: Sure.

Hart: Actually, until December 15.

Hatfield: Yeah.

Hart: But he's been after me—that you know, after all this fifteen per cent is a big deal for him.

Hatfield: Well, now let me tell you my side of the story.

Hart: Yeah.

(Testimony of Gerald A. Hatfield.)

Hatfield: He did talk to me about it yesterday and I said, 'Well, go ahead and talk to Mark Hart and see what you can find out, if he'll let you do it'.

Hart: Right.

Hatfield: And he said 'all right'. Then I got a wire from him this morning asking me to wire you that I was agreeable to it.

Hart: Right.

Hatfield: Well, in the wire—I certainly woke up when he said 'flat cancellation' and caught the idea that I was supposed to assume the liability back to the effective date, and I wired him asking him if that was his understanding, and [52] if so when was the effective date of the earliest policy involved.

Hart: Oh, wait a minute, Jerry. I can see your point, but let me point this out to you and you can confirm this by talking with Smead. I talked to him today, and I said in cancelling these items, we will not cancel and rewrite anything where we have had a loss.

Hatfield: I see.

Hart: Because in that way then we would have to look to you for the losses, and I don't think that would be fair from the standpoint of your company.

Hatfield: No.

Hart: So the decision is—now the only thing we may have—we may have a loss, or maybe a couple of losses in between the time we cancel and the time it's rewritten.

Hatfield: I understand that, sure.

(Testimony of Gerald A. Hatfield.)

Hart: But beyond that, I will assure you—and incidentally, any of those losses will be ours—but I can assure you that we will not rewrite with you anything where we have a known loss.

Hatfield: Well, that's fine—I didn't know that.

Hart: Oh, sure, I don't want to stick you, Jerry.

Hatfield: Yeah. Well, then I also told him in my telegram to him that if that was the case, I was not going to allow any fifteen per cent advance commission on it.

Hart: Oh, I see.

Hatfield: So now I'll have to just wait and see what he comes back with.

Hart: I see.

Hatfield: So at that we ought to get it cleared out tomorrow.

Hart: You think we can get it tomorrow? All right. If I get your authorization to proceed—In other words, you understand, Jerry, that if we cancel and he rewrites in your company, that you don't look to us for the premiums but you've got to look to him.

Hatfield: Oh, yeah, I understand that.

Hart: Would you be good enough to so state that in your telegram when you wire me?

Hatfield: Yeah.

Hart: In other words, I didn't want to proceed unless I get your okay because you and I have always worked close together.

Hatfield: That's right. [54]

Hart: And, incidentally, the fact that we got in

(Testimony of Gerald A. Hatfield.)

that account and that he gave us so much was—you know—you know how that happened.

Hatfield: Sure, I know that.

Hart: As a matter of fact, when I was out there in Oakland the first time, he told me he was continuing his account with Mid-States because they had some money of theirs—you know—tied up.

Hatfield: Yeah.

Hart: And I said, 'God bless you, go ahead'.

Hatfield: Yeah.

Hart: And I told you that before because we weren't trying to get the whole thing. But he's got a better deal with you. I can't give him that deal. He came to New York and told me what you offered him.

Hatfield: Yeah.

Hart: And I'll be very frank with you, Jerry, and tell you we're the only company in the business that doesn't have a prepaid commission up to this point.

Hatfield: Yeah.

Hart: We may have to do it, but up to this point we haven't done it.

Hatfield: You haven't done it yet. [55]

Hart: So if you'll send me—when you hear from him—what time did you send him that telegram?

Hatfield: At noon, my time.

Hart: Noon, your time?

Hatfield: Yeah. That would be, I think, ten o'clock his time.

Hart: Ten o'clock his time. Well, I talked to

(Testimony of Gerald A. Hatfield.)

him a little while ago. He apparently hadn't gotten it.

Hatfield: He hadn't gotten it yet, huh?

Hart: Well, in view of the fact that—in view of the fact that we haven't—I mean, we're agreed on this no loss thing, you might change your mind about that, er——

Hatfield: Yeah, I might.

Hart: I don't care—it's none of my business, you understand.

Hatfield: No, I understand. But let me ask you this, Mark.

Hart: Yes, Jerry.

Hatfield: On the business that you're holding for him now—how does it stand?

Hart: Well, on the business that we're holding now, I don't have any particular breakdown—I have it over-all. I can give you that if you want to hold [56] on a second.

Hatfield: Can you, please?

Hart: Sure. Just a minute. (Sam, would you give me that book on that table, please—under that table—both books—yeah—that's it—yeah—thank you.) Just a second, Jerry.

Hatfield: All right, Mark.

Hart: We have a loss ratio—now let me point this out—he's written with us \$355,000 (yeah) and he's only earned about \$100,000.

Hatfield: I see.

Hart: So it's not seasoned yet—you see, we got in on the tail end.

(Testimony of Gerald A. Hatfield.)

Hatfield: Yeah.

Hart: And his loss ratio's in the low 70's.

Hatfield: Low 70's?

Hart: Yeah. Now, it's improving.

Hatfield: It is improving?

Hart: Yeah, it has every indication of improving. We have one of his accounts has a 46% loss ratio.

Hatfield: Oh, I see.

Hart: 46.7—and the other appears to be improving. His average loss is excellent. His average premium could stand a little jacking up. But here's one thing I want to point out to you, too. [57]

Hatfield: Yeah.

Hart: You have—you got in on the better rate.

Hatfield: Yeah.

Hart: See—so if you judge his experience, you should take into consideration the rate differential.

Hatfield: Yeah.

Hart: In other words, you came up—I think your rate goes as high as 75% above manual.

Hatfield: About 170.

Hart: That's right—and very frankly, we went ahead and more or less copied yours, so we didn't have any——

Hatfield: You did?

Hart: Yeah, we liked your rates. No, no—I'm sorry, I'm sorry—we didn't copy yours—we copied Associated Veterans.

Hatfield: Oh, you're still operating under three different——

Hart: That's right, that's right. We liked yours,

(Testimony of Gerald A. Hatfield.)

but by the time we had gotten the higher rates in, Joe Lotz quit us in favor of you.

Hatfield: I see.

Hart: So our experience does not reflect the better rates, See?

Hatfield: I see. [58]

Hart: So I just want to—I'm not trying to sell you anything—I'm just trying to have you take that into consideration.

Hatfield: Yeah.

Hart: I have every reason to believe that this business is being—this I will assure you, and you have my word for this—that we are not anxious to rewrite from the standpoint of loss experience.

Hatfield: Well——

Hart: That has no bearing on it.

Hatfield: You didn't kick them out, I know that.

Hart: No. Want to get through—no, we didn't kick them out. Of course not. So, Jerry, if everything's all right, will you wire me tomorrow?

Hatfield: I sure will, Mark.

Hart: And say that you will accept the rewrite and that you will look to Joe Lotz for the premiums?

Hatfield: Yeah.

Hart: All right. I'll anxiously wait for it because we'll have a big clerical job to do.

Hatfield: Yeah, yeah.

Hart: Some of them will go back to August, but there will be no losses charged to you whatsoever.

Hatfield: Well, that's a big difference then.

(Testimony of Gerald A. Hatfield.)

Hart: Sure, I know how you feel—I'd feel the same way. Okay, fella.

Hatfield: Thanks for calling me, Mark.

Hart: Now I'll look forward to seeing you next week. Goodbye."

Mr. Garrison: Q. Is that the conversation that you had with Mr. Hart?

A. That sounds to be it, yes.

Mr. Garrison: We will ask this be received in evidence as Plaintiff's Exhibit next in order.

The Court: Be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 5 admitted and filed in evidence.

(Whereupon the document, transcript of telephone conversation between Mark Hart and Gerald Hatfield, was received in evidence and marked Plaintiff's Exhibit 5.)

Mr. Garrison: You referred to a statement made by you and an answer by Mr. Hart in your previous reference to the conversation which I did not notice in the transcript. Do you believe there was some other statement made that did not appear in the transcript?

A. Yes, I believe there was.

Q. And what do you believe that to be?

A. I believe I asked Mr. Hart specifically if Joe Lotz was broke.

Q. What did you believe Mr. Hart said to you?

A. I believe he said, "Not that I know of."

Q. But that didn't come out in my reading. And

(Testimony of Gerald A. Hatfield.)

at this time when you had that conversation you had not received any information from any source, or anyone, that Mr. Lotz was broke?

A. No, sir.

Q. Now, what had you been doing from the time you received the six or eight hundred dailies from Lotz until the time when you went out to Oakland with respect to Mr. Lotz' affairs?

A. Well, we have already talked about the letters and the telephone conversations regarding this Public Service business, and in the meantime I had talked to Mr. Oldberg in Los Angeles and also sent him copies of the correspondence, I believe, although I am not certain on that point. Anyway, as a result of talking to Mr. Oldberg he made visits to Mr. Lotz' office in Oakland to assist him in doing the corrections that I had insisted upon.

Q. Had you received from Mr. Lotz a payment on his account in October?

A. Yes, sir, we did.

Q. And was that before you went to Oakland?

A. Yes, sir.

Q. You recall the amount of that?

A. I think it was in the neighborhood of \$27,000.

Q. And that was for business written, the 75—the two and [61] one fourth months previously?

A. That is right.

Q. That would be the month of July, the business?

A. July, that is correct, July it would be.

(Testimony of Gerald A. Hatfield.)

Q. In other words, you refer to that in the business as the July account?

A. That is correct.

Q. So that all during that period his account was current with you? A. That's right.

Q. Now, you referred to your arrival in Oakland, I believe you and Mr. Czar?

A. Yes, sir.

Q. You met the people that you mentioned, and did you have conversations with Mr. Smead and Mr. Lotz regarding this Public Service business?

A. Yes, sir.

Q. And I believe you also talked with their attorney, Mr. Mead? A. That's correct.

Q. What was their first report to you regarding the general condition of the Lotz agency?

Mr. Bronson: We will object to that as too indefinite, Your Honor.

The Court: Reframe your question. [62]

Mr. Garrison: Yes.

Mr. Garrison: Q. When did you first arrive, and after your arrival when did you see Mr. Lotz and Mr. Smead first?

A. We arrived on the morning of November 24, and I think our first meeting with Mr. Lotz was that afternoon.

Q. And did you have a conversation with him?

A. Yes, we had.

Q. Who was present?

A. At that time it was Mr. Czar, Mr. Oldberg, Mr. Kledzik, Mr. Lotz and myself.

(Testimony of Gerald A. Hatfield.)

Q. Not Mr. Smead?

The Court: Where was it?

The Witness: This conversation took place in the Leamington Hotel in Oakland.

Mr. Garrison: Q. Who is Mr. Kledzik?

A. Mr. Kledzik was also our representative in Los Angeles, but had been replaced by Mr. Oldberg.

Q. I see. And Mr. Smead was not there?

A. Not in our first meeting, I don't believe.

Q. What was the conversation between yourselves and Mr. Lotz on that occasion?

A. Well, our conversation was altogether to do with how much and how bad off he was financially.

Q. Just tell us what was said, not the——

A. In that conversation he stated that he thought he was [63] about \$100,000 short, and he thought there was no doubt about it, he could work out of it all right and eventually, if we would work along with him and cooperate with him, get us paid off in full and we would all come out all right on it.

Q. And thereafter did you have a conversation with him again with Mr. Smead present?

A. Yes, we had conversations with Mr. Smead when he was present.

Q. When was the next conversation?

A. Probably the next morning.

Q. Where?

A. At the Leamington Hotel.

Q. Who was present?

A. I think at that time Mr. Smead and Mr. Lotz

(Testimony of Gerald A. Hatfield.)

was there, and probably Mr. William Mead, his attorney.

Q. You were staying at the Leamington, were you? A. Yes, sir.

Q. And what was the conversation on that occasion?

A. Well, the conversation was more about how we could continue to keep Joe operating to come out of this financial difficulty he was in. In other words, we were still trying our best to cooperate with him.

Q. You wouldn't be permitted to talk about that, you can just now give the conversations.

Were there any written documents prepared up to that time? [64]

A. Not up to that time, no.

Q. That conference had to do, you say, with the working out of Lotz' problems?

A. That's right. We discussed many factors that would be involved in working with him.

Q. Did you see him during this time at his office at all?

A. No, we didn't go to his office either the 24th or the 25th.

Q. All right. When did you talk with him next?

A. We talked with—oh, we talked with him again the following day.

Q. Where?

A. At the Leamington Hotel again. You see, this all happened on a weekend.

Q. I see.

(Testimony of Gerald A. Hatfield.)

A. This is Saturday and Sunday.

Q. I see, that is why you were at the Leamington, and who was present on this third occasion?

A. His attorney, I believe, Mr. Mead. I don't know whether Mr. Smead was there on Sunday or not.

Q. Was anything said by Mr. Lotz or Mr. Smead regarding the nature of their financial embarrassment?

A. Yes, Mr. Lotz did make the statement that he thought he was probably about \$100,000 in the red.

Q. Did he say how he had gotten that way, or anything else [65] about it?

A. He explained that his operating costs had put him in that condition and that he readily admitted that he was paying brokers too high a rate of commission.

Q. All right, and in these three meetings the same subject was discussed, the rehabilitation of the Lotz account?

A. That's correct.

Q. Anything said up to this time about the Public Service business?

A. No, sir.

Q. Anything said about his meeting with Hart in New York and the cancellation of the American Fidelity and Casualty agency contract?

A. No, sir.

Q. Then when did you next see him?

A. Well, I think perhaps the following Monday I did visit his office.

Q. You went to his office?

(Testimony of Gerald A. Hatfield.)

A. Yes. Let's see, let me get the date straight here. The 24th was Friday, the 25th Saturday, 26th Sunday—the reason I remember those dates is because it was the day after Thanksgiving—so the 27th would be Monday.

Q. All right, and what happened on Monday?

A. On Monday we had a further conference with Mr. Lotz and Mr. Smead and his attorney, Mr. Mead. [66]

Q. Where?

A. In Mr. Mead's office and also in the Leamington Hotel, and at that time Mr. Lotz submitted a letter to us telling us how he intended to operate his agency from that date on, and setting forth the various plans he intended to put into operation for us to permit him to continue in business with us.

Q. You know the date of that letter?

A. That letter is dated September—I mean November 27, 1951.

Mr. Garrison: You have a copy?

(Mr. Garrison showing document to Mr. Bronson.)

Mr. Garrison: Q. I show you an original letter dated Oakland, California, November 27, signed Joseph Peter Lotz, and ask you if that is the letter you have been referring to?

You don't have to read all of it, if you can identify it by just glancing at it.

A. This is the letter, yes, sir.

Q. I notice this letter is signed Joseph Peter Lotz, and then the witnesses William B. Mead,

(Testimony of Gerald A. Hatfield.)

Ralph L. Smead. Is that the Mead, the attorney you referred to? A. Yes, sir.

Mr. Garrison: If I may I will read this into the record.

“Oakland, California, November 27th, 1951.

“Mr. Gerald A. Hatfield, General Manager. [67]

“Mid-States Insurance Company, 182 West Lake Street, Chicago 1, Illinois.

“Dear Mr. Hatfield:

“I wish at this time, of my own free will and accord, to relate to you the facts and circumstances surrounding the financial difficulties in which I find myself today, and to explain to you in detail, to the best of my knowledge, how it happened.

“As far back as last July, I had been losing money and was unable to pay my account to American Plan Corporation and other debtors, and it became necessary for me to use trustee funds in the operation of my business. By August 31, 1951, I was insolvent to the extent of approximately \$100,000.00, and where I should have had approximately \$190,000.00 in the trustee account, there was only \$4,000.00 in hand and in cash in banks.

“The American Plan Corporation was insistent that I make a payment on my account, so I made arrangements with the Public Service Insurance Company to pick up approximately \$133,000.00 of insurance. I paid them a 25 per cent commission for this business which amounted to approximately \$33,000.00 and received from them a net amount of about \$100,000.00. I wrote [68] the insurance up in

(Testimony of Gerald A. Hatfield.)

the Mid-States Insurance Company, but instead of leaving it in the trustee account for Mid-States, I paid this money to American Plan on their bill. I still owed them around \$60,000.00 and so around the first of November I made arrangements with American Plan to cancel about \$60,000.00 worth of insurance I had written with them but had not paid for and switched this over to Mid-States.

"The result is that I am now unable to pay my account with you which will be due December 1, 1951, amounting to approximately \$64,000.00, and I don't know where the money is coming from to pay you for the Public Service or American Plan business and the other new business I have been writing; because the latest figures I have from my auditor are October 31, 1951, when I only have \$4,700.00 cash and \$95,000.00 due me from my agents and I owed companies \$361,000.00.

"I feel confident that by continuing to write insurance I can, by paying to you all income received by me in the operation of my business, pay you back all I owe in a short time. Here are the steps I propose to take to accomplish this:

"1. I have as of this date hired George Kledzik to be my general manager with full power [69] and authority to run my agency;

"2. I have limited my drawing account to a maximum of \$600.00 per month and have also limited my entertainment and travel expenses to a maximum of \$350.00 per month and have made other substantial reductions in overhead, and will make such

(Testimony of Gerald A. Hatfield.)

other necessary adjustments as recommended by Kledzik after he has studied the operation of the agency;

“3. I am going to take the necessary steps to reduce the advance commissions paid by me to my brokers as much as possible, and in some cases where a reduction is not agreeable to them, I will discontinue doing business with them;

“4. I will discontinue doing business with those of my brokers whose loss ratio shows them to be a potential loss account;

“5. I will agree to follow all underwriting and claim instructions issued by you to me pertaining to all existing and future business;

“6. I will see that a weekly progress report is given to you, in whatever form you may require, and will also submit to you a monthly operating statement and balance sheet by the twentieth day following the close of each calendar month.

“At any time you desire, I will execute promissory [70] notes to you, or any other documents you may require, in connection with any amount I might owe you.

“I hereby authorize Mid-States Insurance Company, or any of its officers, agents or employees to inspect and examine all the books and records pertaining to the operation of my agency at any time, and to pay all out of pocket expenses in connection therewith.

“I realize that I have violated my agency agreement with you, and agree that you are not waiving

(Testimony of Gerald A. Hatfield.)

and have not waived any rights accruing to you from such violation, and I further agree that you have the right to cancel my agency agreement, dated September 1, 1951, at any time without notice and with or without cause, and I hereby hold you blameless and harmless for any loss that I might sustain due to such cancellation by you.

"I agree to reimburse Mid-States Insurance Company for all expenses incurred by them in connection with the present trip of Messrs. Hatfield, Csar, Kledzik and Oldberg, but such expense shall not exceed \$1,250.00.

"I again want to ask your consideration of the above plan as a basis for the continued operation of [71] my agency, and will appreciate greatly any consideration you see fit to grant me.

Yours very truly,

Joseph Peter Lotz.

"Witness: William B. Mead, Ralph L. Smead."

The Court: What is the date of that letter?

Mr. Garrison: That is dated November 27.

The Court: 1951?

Mr. Garrison: 1951. I ask that this be received in evidence as Plaintiff's Exhibit.

The Court: Be admitted and marked, .

The Clerk: Plaintiff's Exhibit 6 admitted and filed in evidence.

(Whereupon the document referred to and read above, was received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. Garrison: Q. Were you present when that was prepared?

(Testimony of Gerald A. Hatfield.)

A. No, not when it was prepared.

Q. Where was it handed to you?

A. It was handed to Mr. Czar and me in the Leamington Hotel.

Q. And did you have any other conversation with Mr. Lotz or Mr. Smead that disclosed facts regarding his affairs over [72] and above those mentioned in the letter? A. No.

Q. That substantially paraphrased the conversations you had? A. That's right.

Q. After that what was done with that proposal?

A. That proposal was taken back to Chicago.

Q. By whom? A. By Mr. Czar.

Q. And did you subsequently receive some instructions from your home office in connection with it?

A. No, Mr. Czar left Oakland, I think about November 30 and took the proposal back with him to Mr. Titus. Mr. Titus then came out to Oakland on December 5.

Q. 1951? A. That's right.

Q. And he had conversations with Mr. Lotz and with Mr. Smead?

A. After he got here, yes.

Q. Yes. And were you present at any of those when Mr. Lotz was told that that suggestion, those suggestions were not acceptable?

Mr. Bronson: That assumes——

A. At that time——

Mr. Bronson: ——assumes it is a fact. I am going to object to it.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Merely indicating the subject matter of [73] the conversation.

Mr. Bronson: I understand what you are doing, I am just making an objection that it assumes a fact not in evidence.

The Court: Objection sustained. Reframe your question.

Mr. Garrison: Q. Were you present at any conversation with Mr. Titus and Mr. Lotz and Mr. Smead at which time the subject of this proposal was discussed?

A. I don't remember being present, no.

Q. All right. Did you participate in these conversations with Mr. Titus, Lotz, and Mr. Smead after Mr. Titus arrived here?

A. Oh, I participated in conversations with them.

Q. Where was that held?

A. Up in Mr. Lotz' office.

Q. And who was present?

A. Mr. Lotz and Smead and on some occasions Mr. Mead.

Q. The attorney? A. Yes, sir.

Q. When did Mr. Titus arrive?

A. On December 5, 1951.

Q. And commencing with the first conversation, can you tell us what was said by each of the parties, eliminating immaterial matters, referring to the Lotz agency?

A. No, I don't recall the conversation, Mr. Garrison. [74]

Q. I see. Then did you yourself, without anyone

(Testimony of Gerald A. Hatfield.)

else present, have a conversation with Mr. Lotz on the subject of his situation generally?

A. Yes, I had had conversations with him before Mr. Titus arrived.

Q. And where had those taken place?

A. Well, several conversations took place in his office. Occasionally we had dinner together and talked over the table, but one conversation that really sticks in my memory is one that I had with him in his own car.

Q. What date was that?

A. That was on December 4.

Q. And where was it?

A. Well, on December 4, I had an appointment at the insurance department in San Francisco and Mr. Lotz offered to drive me from Oakland to San Francisco to keep that appointment. So we left Mr. Lotz' office then, got into his car about noon. The appointment was for two o'clock in the afternoon, as I recall, and on the way we were just talking back and forth and stopped in a drive-in for lunch.

During that conversation we were talking back and forth I said to Mr. Lotz, I said, "Joe, I'm greatly surprised and certainly lost a lot of my esteem in you for your ever entering into a deal like this Public Service deal without first asking me about it or telling me about it and getting [75] my approval. Why on earth did you ever do a thing like that?"

And his reply was, "Well, they wouldn't let me."

(Testimony of Gerald A. Hatfield.)

I said, "Who do you mean, they wouldn't let you?"

He said, "Ralph Smead and Mark Hart wouldn't let me."

"What on earth has Mark Hart got to do with this deal?"

After which he started to tell me then about the previous——

Q. Well, just tell us what he said.

A. Well, he told me that he had been to New York for a meeting with Mark Hart and the officers of the American Plan Corporation before he had come to Chicago and asked us for a new contract, and that the idea of securing a new contract with us was discussed in that New York meeting.

He also revealed that he owed American Plan a considerable sum on money and that he was receiving constant pressure for payment of such sums of money, and this trip back to New York was part of the pressure; also Mr. Hart and Mr. Feller, I believe, had visited him out here demanding immediate payment and——

Mr. Garrison: Pardon me. This will go on quite a while, Your Honor. Is it your——

The Court: Take an adjournment until ten o'clock.

(Thereupon an adjournment was taken until

May 4, 1954 at 10:00 o'clock a.m.) [76]

The Clerk: Mid-States Insurance Company versus Anglo California National Bank, American Fidelity, American Plan, et al, further trial.

Mr. Garrison: Ready. Mr. Hatfield.

The Court: A trial memorandum here was served on me last night. Who presented that?

Mr. McCallum: I didn't hear you.

The Court: Did you bring this?

Mr. McCallum: I presented one to the Clerk last night, also served copies on other counsel.

The Court: Very well. All right.

The Clerk: Gerald A. Hatfield, to the stand, heretofore sworn.

GERALD A. HATFIELD

a witness for the plaintiff, having been previously duly sworn, resumed the witness stand for further direct examination.

Further Direct Examination

Mr. Garrison: I was asking Mr. Hatfield at the adjournment about a conversation. I would like to interrupt that, if I may, and pick up a couple of items that I left out at an earlier date.

The Court: All right. [78]

Mr. Garrison: Q. You testified yesterday, Mr. Hatfield, about coming out to Oakland with Mr. Czar and having a meeting with Mr. Lotz at Mr. Mead's office in Oakland and receiving from Mr. Lotz and Mr. Mead the plaintiff's exhibit number 6, being the letter dated November 27 to you from Mr. Lotz? A. Yes, sir.

Q. Did you receive from them at that time any other documents? A. Yes, sir, we did.

Q. What documents did you receive?

(Testimony of Gerald A. Hatfield.)

A. We received from him both a power of attorney and an assignment.

Q. I show you a document entitled power of attorney and a document entitled assignment and ask you what those are?

A. This is the power of attorney which we received from Mr. Lotz.

Q. And this document is dated November 27, 1951, signed Joseph Peter Lotz and acknowledged by notary William B. Mead, is that correct?

A. That is correct, yes, sir.

Mr. Garrison: Ask this be received in evidence as Plaintiff's Exhibit next in order.

The Court: Be admitted and marked in evidence.

Mr. Garrison: That is apparently a form power of attorney, and I assume need not be read unless your Honor wishes it.

The Clerk: Plaintiff's Exhibit 7 admitted and filed in [79] evidence.

The Witness: This is the assignment form which we received.

(Whereupon the power of attorney above referred to was admitted in evidence and marked Plaintiff's Exhibit 7.)

Mr. Garrison: Q. And this likewise is signed Joseph Peter Lotz? And is acknowledged by notary William B. Mead? A. That's correct.

Q. And this is an assignment in apparently very broad language, and unless your Honor wishes I shan't read it, ask it be received.

A. Also dated November 27.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Yes.

The Court: Be admitted and marked.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Whereupon the assignment above referred to was admitted in evidence and marked Plaintiff's Exhibit 8.)

Mr. Garrison: Q. I show you now another document which is not titled; ask you what that is.

A. This is the hold harmless agreement.

Q. And this was executed by Joseph Peter Lotz and acknowledged by notary William B. Mead on the 27th day of [80] November?

A. That is correct.

Q. Delivered to you at the same time?

A. Yes, sir.

Mr. Garrison: And this is likewise, your Honor please, in standard form and may that be received in evidence?

The Clerk: Plaintiff's Exhibit 9 admitted and filed into evidence.

(Whereupon the hold harmless agreement referred to above was admitted in evidence and marked Plaintiff's Exhibit 9.)

Mr. Garrison: Q. Now, you referred yesterday to two letters that were mailed by you, written by you, and mailed addressed to Mr. Lotz, being Plaintiff's Exhibits 3 and 4 dated September 28 and October 8.

A. Yes, sir.

Q. And you referred to a telephone conversa-

(Testimony of Gerald A. Hatfield.)

tion that you received from Mr. Lotz after those letters were mailed to him, did you not?

A. Yes, I referred to it.

Q. Now, did you receive any correspondence from Mr. Lotz after those letters were mailed?

A. Yes, Mr. Lotz replied to my letter of October 8 immediately.

Q. I show you a letter on the stationery of the —withdraw [81] that.

Show you a letter dated October 9, 1951 and ask you what that is?

A. This is a letter I received from Mr. Lotz in reply to my letter of October 8.

Mr. Garrison: I think this should be read, your Honor please. This is dated October 9, 1951 and says:

“Mr. Gerald A. Hatfield, Vice-President, Mid-States Insurance Company, 182 West Lake Street, Chicago, Illinois.

“Dear Jerry,

“Have your letter of October 8th, rest assured we are taking immediate steps necessary to comply with instructions set forth therein pertaining to short-term policies rewritten from Public Service Insurance Company.

“After a discussion with Ralph Smead of my office, I would like to pass along to you his reason for accepting this business. We wrote a similar block of this business July 1st of this year through the American Fidelity and Casualty Company and have

(Testimony of Gerald A. Hatfield.)

enjoyed a very good loss ratio, and it was felt the business written with your company would likewise prove profitable. These policies were not canceled by Public Service for underwriting reasons, but due to the fact they had overextended their writing and [82] were compelled by the California Insurance Department to reduce their liability. The business was not written on a hit and miss basis, but on entire individual agent's accounts. It was felt that since the business had been underwritten by the Public Service and seasoned, that it should run off fast and with a low loss ratio.

"Special endorsements pointed out in your letter are used on all military risks, therefore there should be no discrimination from that angle.

"I have instructed Ralph to cancel all policies with loss payable endorsements to those finance companies you mentioned. I also want to put the Mid-States back up where they belong and I will be on the ball at all times."

"So far we have not had any perceptible amount of loss on this business, and I believe with the short term of exposure it will be o.k. We are very conscious of each agent's loss ratio, and will not permit any account to develop any bad ratio of loss for any length of time.

"Regarding embezzlement—the only embezzlement we are condoning is where the entire account has this item on every policy. We let one or two accounts in Los Angeles use this feature and it has been very favorable so far. Mr. Smead has two or

(Testimony of Gerald A. Hatfield.)

three accounts [83] who use it on all their business.

“I will be happy to visit with George and Karl tomorrow and will keep you advised of things fully.

“Best wishes.

“Yours very truly, Joe.”

Mr. Garrison: This stationery seems to be the stationery of American Fidelity and Casualty Company with a line drawn through American Fidelity and Casualty Company and says Ralph L. Smead, General Manager at the top of the letter. Apparently the stationery was simply borrowed for that purpose.

I ask this be received as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 10 admitted and filed in evidence.

(Whereupon the letter above referred to was admitted in evidence and marked Plaintiff's Exhibit 10.)

Mr. Garrison: Q. Now, Mr. Hatfield, when we adjourned yesterday you were telling us about a conversation that you had with Mr. Lotz when you stopped in at a drive-in with him for some lunch, I believe, on December 4, on your way from Oakland to San Francisco to keep an appointment with the insurance commissioner. [84]

A. That is right.

Q. Mr. Lotz had agreed to drive you over. Now, would you give us that conversation, please?

(Testimony of Gerald A. Hatfield.)

A. Shall I start over again?

Q. Yes.

A. As we were riding along in Mr. Lotz' car I turned to him and I said, "Joe, my estimation of you has decreased tremendously because of the way you went into this Public Service deal without first informing me or asking me about it."

I said, "Why would you go into such a deal without contacting me and getting my approval?"

Joe replied, "I wanted to, Jerry, but they wouldn't let me."

I said, "Who wouldn't let you? What do you mean?"

He said, "Ralph Smead and Mark Hart wouldn't let me."

I said, "Mark Hart! Where does he fit into this picture." And with that Joe began to tell me all that had gone on.

Q. Just tell us what he said, don't paraphrase it.

A. Joe said his trouble began with the American Plan Corporation back in August of 1951 when his office had paid an account to American Plan in the amount of some fifty odd thousand dollars, and the check they issued in payment of that account was not cleared by the bank, it [85] was returned to American Plan. I think, for insufficient funds.

Joe said that that began a terrific pressure campaign on the part of American Plan to him, and also he was unable to pay them some six thousand odd dollars which was the commission he owed them on the previous Public Service rewrite with them.

(Testimony of Gerald A. Hatfield.)

He said that he had been under such terrific pressure, receiving telephone calls, teletype messages, sometimes two and three a day demanding immediate payment of his account, and pressuring him in all ways possible.

He then told me about being demanded that he and Ralph Smead fly to New York for a meeting with the American Plan officials, and he and Mr. Smead did go to New York.

During that meeting he told me it was discussed how he was going to pay his account, and sometime during the meeting the idea came up that he should contact Mid-States and see if he could get a new agency contract with us.

Also during that meeting, after this idea came about, a telephone call was put into Mid-States and was put in on a station-to-station basis so that Mid-States would not know where the call was originating. That call was made. I was not in the office, but my secretary got the call.

The next day Mr. Lotz appeared in my office, and I have [86] already testified as to how——

Mr. Bronson: Just a moment, he isn't stating what the conversation was.

Mr. Garrison: Pardon me, counsel.

Q. Just give us the conversation you had with Mr. Lotz when you were in the drive-in.

A. Well, he said that he was cautioned specifically before he came to Mid-States that he should not let us know at all he had been in New York to the American Plan offices. He also told me that he

(Testimony of Gerald A. Hatfield.)

had requested, or he had said he wanted to meet with Dick Cass while he was in Chicago and had been told by Mr. Hart he should not contact Mr. Cass because Mr. Cass might still be friendly to Mid-States.

He then told me about after our meeting in Chicago how he immediately went to his hotel and telephoned both Ralph Smead and Mr. Hart in New York advising them that we had agreed upon a new contract. And he told me then he returned to Oakland.

He told me that shortly after he returned to Oakland Mr. Hart and Mr. Feller of the American Plan visited his office in Oakland, and it was during that visit that the Public Service rewrite deal was engineered.

All through this conversation he kept repeating himself as to how frightened or scared he was of the pressure that was being brought on him, and I asked him, I said, "Joe, why [87] do you think that we would have been any easier on you than American Plan?" And he replied, "Well, he just felt we wouldn't have been as rough as American Plan."

Well, by that time I think I had arrived at the Commissioner's office and that ended the conversation. He waited for me, however, while I had my appointment with the Insurance Commissioner, and then he took me back to his office in Oakland. I don't recall that we talked about it much returning, because I was thinking so fast about it.

Q. You didn't have any further conversation.

(Testimony of Gerald A. Hatfield.)

Well, then, does that complete that conversation as best you can recollect it?

A. Except this: After he had told me all these things he said, "Now, what are you going to do?" And I said, "Well, this certainly puts a different complexion on the entire deal. There is only one thing I can do and that is report to Chicago immediately, I have to report it to our president." And Mr. Lotz begged me not to do it. "Joe, there is nothing I can do but do that." "What are they going to do?" "I have no idea what they are going to do."

I think that is about all the conversation.

Q. Is that the first knowledge that you ever had that Mr. Lotz and Mr. Smead had gone to New York just before you had your meeting with Lotz in Chicago? A. Yes, sir. [88]

Q. Is that the first knowledge that you had that Mr. Lotz had had a check returned in the sum of \$50,000 from the American Plan?

A. Yes, sir.

Q. Is that the first knowledge you had that the American Plan and Mr. Hart were acquainted with and participated in the Public Service so-called rewrite deal? A. Yes, sir.

Q. Is that the first knowledge you had that Mr. Lotz had used the moneys received from the Public Service rewrite deal to pay his account with Mr. Hart and American Plan? A. Yes, sir.

Q. What did you do then after that conversation?

A. Well, I returned to Mr. Lotz' office with him

(Testimony of Gerald A. Hatfield.)

and I talked to Mr. Smead and asked him, told him what Joe had told me, and he confirmed it.

Q. Well, just tell us where that took place and who was present and what was said?

A. That took place in Mr. Lotz' office in Oakland, and I think Mr. Lotz and Mr. Smead and I were the only ones present.

Q. On the same day?

A. On the same day, December 4.

Q. What did you say to Mr. Smead and what did he say to you? [89]

A. I told Mr. Smead that Mr. Lotz had told me what had happened in New York and what had happened prior to that time, and he verified that was true.

Mr. Smead also had some additional facts that Mr. Lotz hadn't told me, that very shortly,—he told me very shortly after Mr. Lotz had telephoned him and Mr. Hart from Chicago that we had entered into a new contract that American Fidelity had canceled their agency contract with him.

Q. Did he tell you when their contract with American Plan or American Fidelity had been cancelled?

A. I don't believe he told me the exact date, no, sir.

Q. Did he say whether they had cancelled it or whether American Plan or American Fidelity had cancelled it?

A. He said American Fidelity had cancelled it.

Q. All right, the other part of the conversation?

A. He also advised me that he had been ap-

(Testimony of Gerald A. Hatfield.)

pointed by American Plan to take care of the financial affairs of Lotz' office, and that Mr. Lotz had no authority whatsoever over the handling of money and funds, and that he had been directed by American Plan how the funds should be handled.

Q. Did he tell you how?

A. I don't recall that, Mr. Garrison.

Q. Then when you finished that conversation, what, if anything, did you do respecting this new information?

A. Well, this was in the evening of December 4, and I [90] immediately went back to my hotel, the Leamington Hotel, and put a long distance call to Chicago, called Mr. Czar, our legal counsel. I told him what I had been told and asked him what I should do. He told me that the best thing for me to do would be to try to get a written statement from both Mr. Lotz and Mr. Smead.

He also told me that Mr. Titus was leaving Chicago that night at midnight to come to Oakland.

Q. Mr. Titus being the president?

A. Yes, sir.

Q. Then what did you do?

A. Well, Mr. Titus arrived in Oakland on the morning of December 5, and he and I had a conference in the Leamington Hotel. I suppose that conference lasted for about an hour or an hour and a half. After the conference I went to the Lotz offices and remained there all day and half of the night.

Q. This is on December 5?

(Testimony of Gerald A. Hatfield.)

A. That is on December 5, yes, sir.

Q. And did you have a conversation with either Mr. Lotz or Mr. Smead on that day?

A. I told both Mr. Lotz and Mr. Smead that I would like for them to sit down and write out what they had told me the day before.

Q. And what did they say? [91]

A. Mr. Smead readily agreed to, but Mr. Lotz was hesitant about doing it.

Q. Did Mr. Smead write out a statement?

A. He wrote out a statement later on in the day, yes, sir.

Q. And where was he when he wrote it?

A. He was in the building which housed Mr. Lotz' office.

Q. That is where the Lotz agency was carried on?

A. That's right.

Q. And did you observe him writing it?

A. Yes, I saw him from time to time writing it. I don't—what I mean is, I certainly didn't stand there and watch him all the way through it, no.

Q. Where were you during that time?

A. He was writing the statement out on the first floor of this building, and I was on the second floor doing some underwriting work of Mid-States business.

Q. And as you went by you observed him as he was writing it?

A. That's right.

Q. Showing you a document consisting of, I believe, ten pages on legal yellow foolscap paper in

(Testimony of Gerald A. Hatfield.)

handwriting in green ink, and ask you if you will identify that.

A. Yes, this is the statement which he wrote out.

Q. And this statement is dated December 6, and it has on it a notarial acknowledgment, William B. Mead, the same person [92] referred to in the other documents as the notary? A. That's right.

Q. And was this—what happened to this document after it was completed by him on that day?

A. It was completed quite late, Mr. Garrison, at night, but when he finished it he came up to the second floor and gave it to me. I stuck it in my pocket and took it to the hotel with me.

Q. And what was done with it thereafter, if anything?

A. The next morning I again met Mr. Titus at the hotel and turned the statement over to him.

Q. What did he do with it?

A. Well, immediately he put it in the hotel safe deposit vault.

Q. I see. Well, now, when was the acknowledgment by Mr. Mead attached?

A. On December 6, in the evening.

Q. That is the following day?

A. No, it is actually the same day the statement is dated.

Q. In other words, started on the 5th, but completed after midnight? A. That is right.

Q. And therefore carried the date of December 6th? A. That is right.

(Testimony of Gerald A. Hatfield.)

Q. And when did you see Mr. Mead in connection with it? [93]

A. We had a meeting with Mr. Mead in his office the night of December 6, I think it was about 8 p.m.

Q. And who was present at that time?

A. At that meeting there was Mr. Joe Lotz, his son, Mr. Jack Lotz, Ralph Smead, Mr. Oldberg and Mr. Titus, and myself.

Q. What was done at that time with respect to this statement?

A. The statement was read orally by Mr. Mead.

Q. Yes.

A. And he would stop frequently and ask Mr. Smead if that was a correct statement, or if there were any corrections to be made. There were a few corrections, I think, made during the reading of it.

And finally when he finished reading it, he asked Mr. Smead if he was willing to sign it. He also asked Mr. Lotz if he was willing to sign it and Mr. Lotz then added a paragraph to it and also signed it.

Q. And you are referring now to the blue-black ink that appears in the margin of the tenth page signed Joe Lotz? A. That's right.

Q. And at that time Mr. Smead also signed it?

A. That's right.

Q. I notice in this document there are a number of scratch-outs and re-interlineations. Were some of those made that evening?

A. That's correct. [94]

(Testimony of Gerald A. Hatfield.)

Q. And Mr. Mead at that time affixed his notarial acknowledgment? A. He did.

Mr. Garrison: I think this is worth reading, if your Honor please.

"Joe Lotz Insurance Agency, 315-14th Street, Oakland, California, December 6, 1951.

"In the months of 1951, the above agency wrote business with the American Plan Corp. of New York until in August of 1951 there was a balance of some \$247,000 due said company. We found ourselves in a position of not having sufficient funds to meet monthly statements and when our check in the amount of \$50,301.88 in payment of April's business was forwarded on July 14, 1951 to the A/P it was returned a few days later by the Central Bank of Oakland for 'uncollected items.' This check was cleared a few days later. On 6-15-51 the A/P asked us for a financial statement of the Agency. The statement was never rendered by this office.

"We explained the situation to the A/P that we had some slow accounts and items had not been remitted to us. July 1st, 1951, this office made arrangement to reinsure a block of business from the P.S. Insurance Co. with A.F.C. with the understanding that 75% of [95] prem. would be paid by P.S. and 25% to be paid by this Agency. All arrangements were completed approx. August 1st, 1951 and on or about that date the P.S. forwarded check for their portion of the remittance to us, we were unable to attach our check for payment of 25% so we forwarded draft from P.S. to A/P on

(Testimony of Gerald A. Hatfield.)

8-3-51. They became disturbed as to the reason we were unable to make our remittance and again requested financial statement of the Agency. After a lapse of several days at which time we had not furnished the statement, Mr. Hart, President of the A/P called Joe via telephone and requested Joe and myself to come to N.Y. and to arrive there not later than Monday, August 13, 1951. We therefore made arrangements and arrived in the A/P office at approx. 12:30 p.m., 8-13-51 and"—

"We were invited into Mr. Hart's office and the following people were present at the discussion:

"Mr. Hart.

"Mr. Feller, counsel of A/P.

"Mr. Sudekum, exec. v.p.

"Mr. Will, treasurer.

"Mr. Lotz and myself."

"Numerous questions were raised by Mr. Hart and Mr. Feller pertaining to the finances of the Agency. Specific questions were asked of me. [96]

"Q. Amount of premiums owed companies?

"A. \$250,000 approx. A/P; \$29,000 M.S.; \$10,000 miscellaneous companies.

"Q. Amount of receivable?

"A. Approx. \$75,000.

"Q. What happened to moneys collected?

"A. Payment of advanced commissions and operating"—and the word operating has been written and scratched out——

"Operating costs.

(Testimony of Gerald A. Hatfield.)

“Various questions were asked by A/P pertaining to use of money by Joe.

“Questions were raised as to how we anticipated to pay account.

“I stated that we felt if we could continue to operate, we could, by maintaining a large float liquidate balance, we discussed M. S. Insurance Co. as a possible carrier and Mr. Hart had Joe place a call immediately to Chicago to Mr. Hatfield. Hart requested several times he didn’t want M.S. to know his position in matter and only wanted it paid and didn’t care how.

(Omission in the reading.)

“I believe Hatfield was out of town and did not see Joe until a day or two later. Hart remarked that if we could not get a connection with M.S. he had another retro carrier in mind he was sure we could get. [97] Hart told Joe to tell Hatfield that we were in N.Y. looking for a better deal and that they would not give it to us, so he wanted to start back with M.S. Hart told Joe to call him immediately from Chicago to let him know if M.S. would go along and gave him his home telephone number.

“During course of conversation question was raised, I believe, by Mr. Will, what will happen if and when M.S. statements cannot be met (if any recourse could be brought against them)——. Hart said he would worry about that if it should develop. At that time it was decided I should return to California immed. to work on May’s account, approx. \$66,000 due 8-15-51. Reservations were made for my

(Testimony of Gerald A. Hatfield.)

plane and that night at 11:30 p.m. and also for Joe to leave for Chicago the morning of 8-14-51. We then retired and made arrangements for a dinner the same night with Hart, Feller and Sudekom. During the evening topic was discussed and it was decided that matter hinged on whether M.S. would give Joe the green light. I told Hart I thought we could collect approx. \$40,000 for the May account by the 17th of August.

“After my return here on the 14th we had telephone conversations on 15 and 16 and collections weren't good so on 17th we had teletype message to make reservation for Hart and Feller for Monday, August 20, 1951. [98]

“During days of 15, 16, 17 I discussed possibility of reinsuring business in amount of \$150,000 with Mr. Jim Russell, and John Shea of the P.S. Ins. Co. We had already discussed with Hart this possibility on the reinsurance bordereaux. I told Hart over phone about this and somewhere therein the thought of rewriting business on p/r unexpired basis was developed. I cannot definitely say whether the idea originated from Hart or was my own thinking. Anyway it was decided it would be a big aid in paying A.F. and C. as the picture as presented looked very good. I then hung up and called Joe at the Palmer House in Chicago and told him about it and asked him to discuss it with the company while he was there. We decided on his return that we must take the business which on 8-20-51 at night

(Testimony of Gerald A. Hatfield.)

we consummated the deal with Russell and Bond. During the day of the 20th while Mr. Hart and Feller were in the office, Hart was anxious to go see that the deal was o.k. with P.S. and had me telephone them to confirm it, he did not wish his name mentioned, however, and didn't want P.S. to know about him at all.

"On the 20th of August we had a meeting with Hart, Feller and Mead and discussed possibilities of obtaining a \$50,000 loan on guaranteed reserve of A/P through a connection of Mr. Mead. Mr. Mead told [99] Hart that he had worked on the deal sometime before and thought there was still a good possibility. The time was approx. 4:30 p.m. and Hart wanted Mead to call his party then. Mead said no, he would not bother his prospect at that hour. Hart said he would get loan at bank then and Mead dropped his efforts and Hart and Feller spent considerable time at bank but were unable to obtain loan. So it was decided the A/P Corp would make a \$50,000 loan to help take care of statement due 8-15-51. Joe gave Hart a check for \$20,000 on 8-20 or 21 from trustee funds. Feller and Hart worked up an agreement the night of 8-21-51 and morning of 8-22-51 which Joe signed on 8-22-51 and I accepted designation as representative of A/P. I was requested to visit Hart and Feller at their room in the Leamington Hotel on the night of 8-21-51 which I did. I was asked to be designated representative and accepted for benefit of Joe inasmuch as I understood they would bring someone else in unless

(Testimony of Gerald A. Hatfield.)

I did. On the morning of 8-22-51 Joe and I were asked to meet Hart and Feller at the Central Bank to read agreement. They were scheduled to leave for L.A. about that time and were in a rush to get out so Joe signed agreements and I agreed to be their representative. We did not have opportunity to have agreement checked by Joe's [100] attorney.

"As Mr. Feller was leaving he handed me a copy of agreement plus an additional document in a sealed envelope marked to me and personal. On examining this later I found it to be an offer of \$1,000 if balance was paid by 9-15-51. There had been absolutely no previous discussion of this. I called Hart the following night at his hotel in L.A. and told him I would have absolutely nothing to do with the receiving of any money. He said o.k. and I did not receive this money.

"We did not start actual mechanics of rewriting P.S. policies in M.S. until the first week of Sept. Hart called numerous times and wanted to know how long it was going to take and when he could expect money from that. He instructed us to deposit all normal checks direct to the account of A.F. and C. but to deposit any checks received from P.S. to Joe's trustee account and then issue a check to A.F. and C from trust account. We told him of a M.S. statement of approx. \$29,000 for June business due 9-15-51. He wanted it paid. However, due to his pressure we did not remit account until 10-15-51. We managed to pay A/P all of balance except approx. \$60,000 which amount in prem. value was

(Testimony of Gerald A. Hatfield.)

cancelled flat by A.F. and C. and rewritten [101] in M.S. Ins. Co.

“Supplementing the following:

“On August 13, 1951, while in New York in the American Plan office, Mr. Hart instructed his telephone operator in placing telephone call to Mr. Hatfield in Chicago, to make call station to station so Mr. Hatfield would not know Joe was in Hart’s office.

“Around November 1, 1951 I had a telephone conversation with Mr. Hart about balance of approx. \$60,000 due A.F.C. and asked about possibility of reinsuring that amount with Mid-States Insurance Company and was informed by Mr. Hart that due to certain laws of the State of New York that reinsurance was not permissible. It was during this telephone conversation that Mr. Hart suggested that a premium volume amounting to the balance owing, be cancelled flat by A.F. and C. and rewritten in Mid-States Insurance and instructed me to call Mr. Hatfield in Chicago to see if arrangements could be made.

“Signed Ralph L. Smead.”

There is a notarial acknowledgment form attached dated 6 December, and signed William B. Mead, and in the margin on the left side in a different handwriting it says:

“I have the statements of Mr. Smead and as to all occasions when I was present it is a correct statement. [102] Joe Lotz.”

(Testimony of Gerald A. Hatfield.)

Ask this be received in evidence as our next exhibit.

The Court: Admitted next in order.

The Clerk: Plaintiff's Exhibit 11 admitted and filed in evidence.

(Whereupon the statement above referred to was admitted in evidence and marked Plaintiff's Exhibit 11.)

The Court: Take a recess.

(Short recess.)

Mr. Garrison: Q. Mr. Hatfield, were you furnished any other written statements by Mr. Smead at about that same time?

A. Yes, on the following day Mr. Smead recalled some other incidents that he thought should be added to this statement, so he wrote a supplement to the statement.

Q. Showing you another page—a one-page document on the same yellow foolscap paper and ask you if that is the statement you refer to?

A. This is the one, yes, sir.

Q. And this is dated 12-7-51 and reads as follows:

“Since making my statement of December 6, 1951 a few additional items have come to my attention which I think I should state:

“1. While in New York in Mr. Hart's office Joe [103] mentioned that he wanted to see Dick Cass and Hart said several times for Joe not to see Cass as he was afraid Cass might be friendly with some-

(Testimony of Gerald A. Hatfield.)

one at Mid-States and tell them what we intended to do. Joe promised him he would not see Cass.

"During a telephone conversation with Mr. Hart in November approx. \$60,000 premium volume of A.F.C. policies had been cancelled and rewritten in Mid-States Insurance Co., Mr. Hart asked me to destroy any teletype messages that were sent during course of liquidation that might be harmful to him.

"Ralph L. Smead."

Mr. Garrison: Ask this be received in evidence as Plaintiff's Exhibit next in order.

The Court: Be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 12 admitted and filed in evidence.

(Whereupon the statement above referred to was admitted in evidence and marked Plaintiff's Exhibit 12.)

Mr. Garrison: Q. Did you receive any other statements from Mr. Smead?

A. Yes, on the day following, I think December 8th, he wrote a further statement.

Q. I show you a longhand statement of three pages on yellow [104] paper, ask you to identify that, please.

A. This is the statement he wrote on December 8th.

Q. This statement, top of the page number 1 in a circle, 12-8-51:

"Concerning rewriting of Public Service short term policies in Mid-States Insurance Company. In

(Testimony of Gerald A. Hatfield.)

July of 1951 we arranged a reinsurance transaction for the Public Service Insurance Company with the American Fidelity and Casualty Company. This transaction amounted to approximately \$27,000 in premium volume and was handled on a reinsurance bordereaux. This transaction was completed in August of 1951. Approximately August 15 we were again approached by Mr. Shea and Mr. Russell of the Public Service Insurance Company and asked if American Fidelity and Casualty Company would be interested in an additional block of reinsurance amounting to approximately \$150,000 in premium volume. About this time our relationship was cancelled with the American Fidelity and Casualty Company, so reinsurance was impossible through that company. I informed Public Service Insurance Company on or about August 15 that A.F. and C. could not be interested in the reinsurance. It was necessary for Public Service to either reissue business or cancel. Idea was thought of to have Mid-States rewrite Public [105] Service policies on unexpired term. I was told that California Insurance Department required Public Service that their policies had to be cancelled before September 5, 1951. On August 20, 1951, agreement was signed by Joe to write this business that was being cancelled. Mr. Russell and Mr. Shea of the Public Service were in Joe's office at approx. 8:00 p.m. on 8-20-51. We agreed that Russell and Bond, general agents of Public Service, were to do all work in connection with the rewriting of this business and were to

(Testimony of Gerald A. Hatfield.)

receive an additional ten percent for this work. Policies and endorsements were furnished to Russell and Bond and work was performed by them and under their instructions. Russell and Bond, Inc. was appointed with Insurance Department as agents of Mid-States Insurance Company.

“A list of sub-agencies were furnished by Russell and Bond and their agents were appointed in the Mid-States Insurance Company.

“We had numerous verbal and telephone conversations with Mr. Shea and Mr. Russell. They were more insistent on the consummation of this deal than we were. They stressed the fact that this business would be very profitable first because it was in the later stages of the policies and second, that it was a high quality type of business from their better agents. And had it [106] not been for the constant pressure we had from Mr. Hart we would not have taken deal. Hart was demanding payment and Mr. Shea and Russell were aware of that fact. There was no written transaction other than commission agreement of 8-21-51 (?) when any details developed they were either handled by phone or Mr. Shea or Mr. Russell would come to our office.

“Signed Ralph Smead, Joe Lotz.”

Ask that that be received in evidence as Plaintiff's Exhibit.

The Court: Be admitted and marked.

The Clerk: Plaintiff's Exhibit 13 admitted and filed into evidence.

(Testimony of Gerald A. Hatfield.)

(Whereupon the statement above referred to was admitted in evidence and marked Plaintiff's Exhibit 13.)

Mr. Garrison: Q. Now, after completing these—or after receiving, I should say, these statements, what did you do?

A. After receiving those statements Mr. Titus and I left for Los Angeles on December 9, I believe. At the same time we had made arrangements to meet Joe in Santa Monica on December 10, which I believe was a Sunday. Joe was going to Santa Monica to try and collect some premiums due him from one of his sub-agents. At that time he was [107] also to give Mr. Titus his written statement——

Q. Now, my question I had reference particularly to anything you might have done in connection with the Lotz agency and the business that they had on the books.

A. All the time I was there I was busy doing underwriting work trying to purify the business written in Mid-States so it might be liveable and come out with a profit of some kind.

Q. What do you mean by that? That is terminology that I am not familiar with?

A. I mean, picking out sub-standard risks and canceling it or change it by endorsement so it would not be quite so substandard.

Q. And improve the class of the business?

A. That's right.

(Testimony of Gerald A. Hatfield.)

Q. Grade of business. And did you do anything——

Mr. Bronson: I didn't hear enough. This refers to what date?

Mr. Garrison: I said trying to improve the class.

Mr. Bronson: I lost more than that, ask the reporter to read the answer. May I have that, your Honor.

(Record read by the reporter.)

Mr. Garrison: Were you doing this work on the policies that had been cancelled, Public Service policies that had been cancelled and rewritten in Mid-States? [108]

A. Yes, sir.

Q. What did you find with respect to the class of business that had been taken over from Public Service as to whether it was standard or sub-standard.

A. I found out the majority of it was sub-standard.

Q. And it was business which, in your opinion, could not be underwritten profitably?

A. That's correct.

Q. Then did you have a chance to look at the books that Mr. Lotz was keeping or not keeping, as the case may be?

A. Yes, we had the opportunity to look at them. I think I forgot to tell you that before Mr. Titus left Chicago on December 4 he had ordered the auditing firm of Lester, Herrick and Herrick to come in and make a complete audit.

(Testimony of Gerald A. Hatfield.)

Q. What was the condition of Mr. Lotz' books at that time?

A. They were in a deplorable state.

Q. In respect to what?

A. In respect to postings, in respect to—in all respects, just hadn't been kept up to date, far behind, you couldn't tell the exact status of the Agency at all.

Q. Had you ever had occasion in previous months or years to see his books?

A. No, sir, I had not.

Q. And did Lester, Herrick and Herrick come in and make [109] a complete audit of the Lotz accounts?

A. Yes, sir.

Q. And did they render you a written report?

A. Sir?

Q. Did they render a written report of their audit?

A. Yes, sir.

Q. Do you know how long it took them to complete that?

A. Yes, it took them quite a long time, I think in the neighborhood of a month or six weeks.

Q. And then at that time, you were, I take it, not cancelling all of the policies that had been written by Lotz?

A. No, sir, that's correct.

Q. Why was that?

A. Well, at that time, we were still trying to work out a workable solution to keep the Lotz Agency in business and also, perhaps, stay with a

(Testimony of Gerald A. Hatfield.)

portion of this business he had taken over and come out with a profit on it.

Q. And you are now speaking of the time prior to receiving the statement of Mr. Lotz in the drive-in restaurant?

A. Prior to that, and also for a short time after that.

Q. Then did you have a change of mind on that subject? A. Yes, we did at a later date?

Q. When?

A. I think our actual change of mind came about about December 9 or 10. [110]

Q. And what brought that about?

A. That's why we were in Santa Monica, and on December 10, I believe it is—anyway, it was a Sunday, Mr. Lotz came to the home of Mr. Oldberg where Mr. Titus and I were also visiting that Sunday afternoon.

Q. By appointment?

A. By appointment. We had arranged to meet him there before we left, that is correct. And he came in, I think it was, about four o'clock in the afternoon and gave Mr. Titus the statement he had written out. Mr. Titus asked him——

Mr. Bronson: Now wait a minute, I am going to object to the conversation. I am interpreting the question as between some officials of your own company?

Mr. Garrison: No, Mr. Lotz was doing that——

Mr. Bronson: Excuse me.

Mr. Garrison: Go ahead.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: You keep your voice up, if you will please, Mr. Hatfield.

The Witness: Yes, sir.

Mr. Bronson: I have difficulty hearing this morning.

Mr. Garrison: Q. Yes, give us that conversation. Who all was there?

A. At Mr. Oldberg's house?

Q. Yes.

A. Mr. Oldberg, Mr. Titus, Mr. Lotz, and myself. [111]

Q. What was said and by whom?

A. Well, the conference didn't last very long. Mr. Lotz told Mr. Titus that he had not been successful in securing the money held out from this agent in Santa Monica, and during the conversation Mr. Titus asked Mr. Lotz to whom the Public Service checks in payment of the premiums had been paid, and Mr. Lotz replied that the checks had been made payable to Mid-States Insurance Company.

Mr. Titus asked him if he had endorsed those checks and Mr. Lotz said he had, and deposited them into his trustee's account. With that the conference was ended and Mr. Lotz left.

Q. Did he say who got the money?

A. I don't recall whether he said that at that time or not.

Q. Then you made a decision to do what in respect to the business?

A. We decided at that time that things were in

(Testimony of Gerald A. Hatfield.)

such a horrible shape, no possible chance to try to salvage the Lotz Agency and keep it in business.

Q. What did you do as a result of that decision?

A. Well, Mr. Titus immediately flew back to Chicago to confer with Mr. Schimberg and also to confer with Mr. Hart.

Q. Mr. Schimberg being your general counsel in Chicago? [112]

A. That's correct.

Q. The gentleman sitting at this table?

A. That's correct.

Q. And who is the other person?

A. He had a conference with Mr. Hart in Chicago, American Plan.

Q. President of the American Plan. Then what did you actually do?

A. I went from Los Angeles back to Oakland, and then Mr. Titus returned to Oakland on December 13, and during—from December 13 to December 20 we were still both here in Oakland, I continued to work in the Agency and just do all the various detail tasks that were necessary to be done to protect our interests, and Mr. Titus——

Q. You made a decision, as I understood it, to do something else than you previously intended with the Agency. Now, I am asking you what did you do pursuant to that decision?

A. Well, we had decided at that time we couldn't go on.

Q. Yes, but what did you do? You made a decision and what were your actions?

(Testimony of Gerald A. Hatfield.)

A. Well, our decision was to cancel all this outstanding Public Service business.

Q. I know, but did you do it?

A. We did that, yes, sir. [113]

Q. How did you go about that, what does that involve?

A. The cancellations, the mass cancellations I am referring to was actually performed out of our home office in Chicago. The notices were all typed up, had to type an individual cancellation notice on each outstanding policy, and those notices were typed in Chicago around December 20 or 21, somewhere around there.

Q. What was done in the Oakland office pursuant to that decision?

A. Well, there were many items that had to be cleared up, such as endorsements, requested on these outstanding policies, cancellations agents had requested, and we spent our time, I spent my time in trying to get that cleared up before getting started on this mass cancellation.

Q. Yes. Did you make any arrangements for office space or hire any employees?

A. Oh, yes, at that time we decided to take over all property that had anything to do with Mid-States, and we received a letter from Mr. Lotz authorizing us to rent his office and to rent his equipment and to hire his personnel in pursuance of what we wanted to do.

Q. And what personnel did you employ?

A. We employed all the girls that were working

(Testimony of Gerald A. Hatfield.)

with him at that time, and also Mr. Kledzik, I think, we put back on our payroll.

Q. And the ultimate result of those activities was what? [114]

A. The ultimate result was that as far as Mid-States was concerned our business was gradually—we stopped writing business 100 per cent, we were writing no new business.

Q. Did you cancel Mr. Lotz' agency contract?

A. Yes, sir, we did.

Q. As of what date?

A. As of January 21, 1952, I believe.

Q. In connection with these terminating activities that you are referring to, did you receive from Mr. Lotz any letter agreement in connection with his office space and equipment?

A. Yes, sir, he gave us a letter.

Q. And when was that?

A. I think it was December 28.

Q. I'll show you a letter dated December 28 consisting of two pages with an exhibit attached and ask you if that is the letter you referred to?

A. Yes, sir, this is the letter.

Mr. Garrison: This letter is dated December 28, 1951, addressed to Mid-States Insurance Company, 182 West Lake Street, Chicago, Illinois:

"Gentlemen:

"Please be advised that I plan on limiting the size of my insurance agency business and plan on vacating the second floor area now occupied by me at [115] 315 - 14th Street, Oakland, California. I

(Testimony of Gerald A. Hatfield.)

hereby agree to rent to you all furniture and equipment owned by me and located on said second floor, as per the inventory attached hereto and marked Exhibit 'A'. Should you elect to rent said equipment, you shall have the right to do so for a period not to exceed one year for a total rental of \$1,200.00.

"This letter may be accepted as my consent to your employing any of the personnel now employed in my agency.

"It is agreeable with me for you to make arrangements to lease the said second floor space which I intend to vacate, and it is further understood that I shall not be liable for any rent for said space during the period of your occupancy.

"You are to have possession of all my books, accounts, and records covering my insurance agency business prior to this date. It is understood and agreed, however, that said books and records shall not be removed from the second floor area to be occupied by you, and I, my agents, and accountants shall have access to said books and records at any time during business hours. At such time as you have no further use for said books and records they are to be returned to me.

"You have previously cancelled my general agency appointment and I have executed assignments to you [116] representing moneys due me in connection with business written by the Joe Lotz agency. Nothing in this letter or our arrangements in connection with your cancelling this business shall be construed as an agency appointment or contract of

(Testimony of Gerald A. Hatfield.)

employment. It is further understood and agreed that your occupancy of the second floor space is an arrangement of convenience only, and shall not be construed as being connected with my activities as an insurance agent. I further agree to hold your Company and your agents and employees harmless by reason of their actions in the cancellation of any business written by me, the return of the premiums therefor, and the payment of claims arising thereunder, and no liability shall arise to you and them because of the use of any of my books and records because of postings or entries made therein or otherwise.

“Very truly yours, Joe Lotz.”

Then there is attached to it an inventory of property owned by Lotz enumerating a number of pieces of office equipment.

Ask this be received in evidence as Plaintiff's Exhibit.

The Court: Be admitted next in order.

The Clerk: Plaintiff's Exhibit 14 admitted and filed in evidence.

(Whereupon the letter read above with the attached [117] exhibit were admitted into evidence and marked Plaintiff's Exhibit 14.

Mr. Garrison: Q. Now, as I understand it then, you proceeded to cancel all business written by Joe Lotz?

A. Not entirely all of it, no, Mr. Garrison, but the greater portion of it, yes.

(Testimony of Gerald A. Hatfield.)

Q. And that was accomplished, you say, out of Chicago? A. Yes.

Q. And what was done then, with respect to the losses and endorsements and the cancellations?

A. We continued to operate our office on the second floor of that building for several months as a service office to the policy holders for the purpose of handling endorsements, handling claims, maintaining our claim office here, for a long time.

Q. And did you pay the losses that occurred?

A. We certainly did.

Q. And when you cancelled policies that had been written by Mr. Lotz, what was necessary to do in connection with the assured's interest in the matter?

A. On every policy we cancelled, we were obligated to pay back the unearned premium on each policy to the individual insured.

Q. In other words, the policy being cancelled before normal expiration, the assured having paid the premium, he was [118] entitled to be reimbursed for any portion of that premium that represented the unexpired portion of the policy, is that true?

A. For the pro-rata remaining portion, that's right.

The Court: Contract provide for cancellation?

The Witness: Yes, sir.

Mr. Garrison: Q. And was that necessary in the case where policies had been written in your Company and where you had not received the pre-

(Testimony of Gerald A. Hatfield.)

mium? A. Yes, sir.

Q. So that you paid, then, not only the losses, but the returned premium to the assured, even cases where you had not received any premium?

A. That's correct.

Q. And you had expenses in connection with the employees there? A. Yes, sir.

Q. And the travel that occurred back and forth between Oakland and Chicago?

A. That's correct.

Q. Do you know what the total amount of the writings were, the net writings by Mr. Lotz as of the time you discovered that condition and decided to cancel out?

A. I don't have that figure in my head. Could I see our auditor's report? [119]

Q. I will show you the schedule 1 that I referred to in my opening statement and that has been agreed by counsel as reflecting accurately the figures that appear on the books of the Mid-States Insurance Company, and ask if you can tell us what the total net premiums—written premiums were by Mr. Lotz?

A. The total net written premiums were \$196,-714.50.

Q. And I presume in this termination or liquidation of the Lotz Agency you received some cash receipts, did you not?

A. Yes, we received some cash.

Q. What would be the sources from which those would come?

(Testimony of Gerald A. Hatfield.)

A. From sub-agents who owed Joe balances on Mid-States policies. Also returned commissions from sub-agents on cancelled policies.

Q. In other words, was it part of your operation there to try to collect anything that was owed Mr. Lotz?

A. Yes, sir, we spent a great deal of effort trying to make collections.

Q. And how much was collected in that activity? A. \$60,015.50.

Q. And did you credit them on the net premiums that were written in order to arrive at your out of pocket losses? A. That is correct.

Q. And what did that net produce?

A. \$136,699. [120]

Q. Now, on any of the business that remained in effect, whether it was allowed to run the normal expiration or was cancelled, were any commissions earned by Mr. Lotz on any of that business?

A. Yes, sir.

Q. And how did you determine what commissions Mr. Lotz was entitled on any of those writings?

A. Well, we determined it in accordance with the contract we had with him.

Q. And what was that?

A. Well, that contract was that Mid-States was to retain 14 per cent of the earned premium dollar, and 86 per cent was to be credited to Mr. Lotz.

Q. And that 86 per cent of the earned premium was the fund out of which losses were paid?

(Testimony of Gerald A. Hatfield.)

A. That's correct.

Q. And loss expense?

A. That's correct.

Q. And then the residue, if any, was what Mr. Lotz kept as his commission? A. Yes, sir.

Q. Now, did you find that in this termination or liquidation of the Lotz business that he did actually in fact earn some commission?

A. Yes, sir, we did. [121]

Q. And how much did he earn?

A. He earned \$38,698.71.

Q. In other words, that was the amount that was left after all losses and all loss expenses were paid and your 14 per cent was taken out?

A. That's correct.

Q. Did you credit his account with that amount of earned commission?

A. We credited his account with \$37,835.39, which is the difference of \$863.32 because we had already paid him that amount. [122]

Q. In other words, he had a debit on his books and you took—you subtracted that?

A. We made a payment in September of '51 of that amount of \$863.32.

Q. Now, you incurred, you say, expenses for salaries and miscellaneous other items involving refunds to agents and other expenses?

A. Yes, sir.

Q. And how much was that?

A. The expenses you want to know, Mr. Garrison?

(Testimony of Gerald A. Hatfield.)

Q. Yes, the refunds, the returned premium refunds.

A. You want to know the returned premiums?

Q. Yes.

A. The returned premiums that we allowed amounted to \$156,330.73.

Q. You say you allowed it. What do you mean by that? A. I mean we paid them.

Q. I see. And then what were your expenses in handling the collection of any of these amounts?

A. That amounted to \$52,412.62.

Q. Those are your actual out of pockets?

A. That's correct.

Q. Now, we referred here to a litigation that was instituted by Mid-States against the Anglo bank. You are familiar with that litigation?

A. Yes, sir. [123]

Q. And that was for the purpose of making some collections that were felt due as a result of this Lotz activity? A. That's correct.

Q. And that litigation was settled, I believe, for \$37,500? A. That's right.

Q. And did you incur expenses for accounting and legal and other expenses in connection with that litigation? A. We did.

Q. How much were your expenses?

A. \$11,640.

Q. And did you credit the balance, the net difference from the \$37,500 recovery after deducting the expenses to Mr. Lotz' account?

A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. So that when you got through with the account and gave him credit for these items I have mentioned, charged him with all these expenses you referred to, what is the net loss that has been suffered by the Mid-States Insurance Company as a result of Mr. Lotz' activities?

A. \$281,746.96.

Q. I will take that back if I may.

Mr. Garrison: This document, Your Honor, is attached to the opening statement that I read at some length the morning of the first day, and I would like to ask that that exhibit [124] that is attached to the opening statement be made, be introduced in evidence as an exhibit. I would be very glad to substitute a copy of that, if that would be agreeable.

The Court: No objection? Admitted.

Mr. Bronson: Not involving us in any obligation or any admission of the appropriateness of the charges of damages in this case, Your Honor, that is all. In other words, we will make our objection to the items, if that becomes an issue in the case later, and I didn't want the allowance or the exhibit to go in evidence as carrying any admission.

The Court: It may go in subject to your motion to strike. That will cover your—

Mr. Bronson: Subject to motion to make, or on showing in connection with it, if it becomes an issue, as long as we are permitted to.

Mr. Garrison: Certainly, counsel is always entitled to make a showing, but this, of course,

(Testimony of Gerald A. Hatfield.)

wouldn't foreclose that. The witness has testified to the facts, however, and I simply wanted to put into the record a written statement of his testimony which is shown in this exhibit.

Now, he has testified to the actual facts and that evidence is in the record, and I think if he has any objection to the testimony of the witness the objection should be made at this time rather than at some other time. Whether the legal effect of these charges are may be something else, that is a question [125] of law, but as to the question of evidence, this man knows the facts and has testified to them, and unless there is objection to his testimony I assume that it stands as given.

Now, all I am doing now is suggesting that the record contain a tabulation which outlines his testimony and it wouldn't be any more objectionable than his testimony itself.

The Court: May be admitted and marked.

Mr. Garrison: Thank you.

The Clerk: Plaintiff's Exhibit 15 admitted and filed in evidence.

(Thereupon document referred to above was received in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Garrison: I have another subject to start but I notice it is almost 12:00 o'clock.

The Court: If there be no objection you can go to lunch.

Mr. Garrison: Thank you, Your Honor.

(Thereupon an adjournment was taken until the hour of 2:00 o'clock p.m., this date.) [126]

GERALD A. HATFIELD

resumed the stand on behalf of the plaintiff and having previously been sworn testified further as follows:

Direct Examination—(Continued)

Q. Referring back, Mr. Hatfield to the so-called American Fidelity rewrite deal, which is the one you testified to that involved conversations with Mr. —telephone call from Mr. Smead and some wires that went back and forth between you and Mr. Smead, and the one that had to do with the telephone conversation with Mr. Hart, which had been monitored or recorded at Mr. Hart's end of the line, and I read the transcript of that telephone conversation, do you recall that? A. Yes, sir.

Q. You recall that incident. And I believe you testified that deal had to do with taking over a certain amount—volume of business that had previously been written on the American Fidelity Company and placed on the books of Mid-States Insurance Company? A. That's right.

Q. And in that conversation that I read—the transcript which I read, Mr. Hart asked you, told you, rather, that you were to look to Mr. Lotz for payment of those premiums?

A. That's correct. [127]

Q. Did you, after that telephone conversation with Mr. Hart, send him any wires pursuant to his request?

A. Yes, on the following day I sent him a telegram.

(Testimony of Gerald A. Hatfield.)

Q. And what date was that?

A. November 1, 1951.

Q. Show you a copy of a telegram dated November 1, 1951, addressed to Mr. Mark M. Hart, New York City, and ask if that is the wire you have in mind? A. Yes, this is the one.

Q. And that wire is Western Union, charge Mid-States Insurance Company, dated November 1, 1951, telegram.

“Mr. Mark M. Hart

“American Plan Corporation

“44 Wall Street

“New York, New York

“We Agree To Rewrite Group Of Policies On Which You Permit Joe Lotz Agency To Cancel Flat with understanding We Will Not Assume Any Outstanding Claims. We Will Look To Lotz For Payment Of Premiums.

“Gerry Hatfield.”

Ask that this be received in evidence as Plaintiff's Exhibit next in order.

The Court: Be admitted.

The Clerk: Plaintiff's Exhibit 16 admitted and filed in evidence. [128]

(Whereupon the telegram above read into the record was admitted into evidence and marked Plaintiff's Exhibit 16.)

Mr. Garrison: Q. Now, when you sent that telegram to Mr. Hart, did you know Mr. Lotz was insolvent? A. No, sir.

Q. Had you know Mr. Lotz was insolvent would

(Testimony of Gerald A. Hatfield.)

you have agreed to accept that business and look to Mr. Lotz——

Mr. Bronson: We will object to that, speculative, your Honor please.

The Court: What he might have done?

Mr. Garrison: Would he have accepted the business and looked to Lotz for payment had he known Lotz was insolvent.

The Court: Overruled. He may answer.

A. Well, of course not, that was—simply have increased Mr. Lotz' indebtedness by \$61,000.

Mr. Garrison: Cross-examine.

Mr. McCallum: On the order of proof on this matter do I proceed next? I have an interest of a plaintiff here in this proceeding and would you wish——

Mr. Bronson: Your Honor, I am happy to have Mr. McCallum go ahead any time he wants to in this case.

The Court: You go ahead.

Mr. McCallum: I shall proceed. Thank you.

Cross Examination

Mr. McCallum: Q. Mr. Hatfield, have you ever had any correspondence with Mr. Lotz on the subject of whether or not he was authorized to endorse checks made payable to Mid-States Insurance Company? A. Yes, sir.

(Colloquy between Mr. Bronson and Mr. McCallum inaudible to the reporter.)

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: You have reference to the middle paragraph on here?

Mr. McCallum: Yes.

Mr. Bronson: If your Honor please, counsel has handed me a group of letters here dated in late August and in early September that refer to the subject of authorization of Lotz in connection with the deposit in the Anglo Bank. Now, it is our position that those are absolutely irrelevant here, that is a matter of settlement of that case and had judgment entered on the settlement, and if we are to try it over again that is a matter your Honor will do if you want to, but we see no relevancy here. I would like, if counsel will, state his purpose so that we understand it.

The Court: You may indicate for the purpose of the record the purpose of this offer.

Mr. McCallum: Our position is this, your Honor: If there was a conspiracy as has been alleged and which we believe [130] there was, the Bank was a party injured in carrying out that conspiracy. As part of this conspiracy funds were taken that were made payable to Mid-States Insurance Company and put into a trustee account maintained by Joe Lotz by the Anglo Bank; that Joe Lotz, in carrying out that conspiracy, represented and stated to the Anglo Bank that he had authority to endorse those particular checks and to deposit them in his trustee account; that he made that representation for the purpose of gaining control of those funds; that he then took those funds and paid them over

(Testimony of Gerald A. Hatfield.)

to the American Fidelity and American Plan companies; that at the time he told the Bank that he had authority to endorse these checks and obtain these funds, only he had no authority to endorse the name of Mid-States on those checks, and the position of the Bank is that as an injured party, injured in the performance of carrying out the plan of conspiracy to take funds and to use them to pay off the indebtedness of Mr. Lotz to the American Fidelity Company.

Mr. Bronson: The hole in that is he doesn't connect it up with us, we had no dealings with the American Bank whatever and until there is some sort of foundation laid, your Honor, I see no relevancy here.

Mr. McCallum: Any party injured in carrying out the conspiracy has a charge or claim against the parties who are responsible for that conspiracy.

Mr. Bronson: You have to have some evidence, it seems to me, your Honor, that this was something that we joined in and it was, in fact, a part of the conspiracy.

Mr. McCallum: It will be all joined in.

Mr. Bronson: The letters don't show it.

Mr. McCallum: Well, when the plaintiff's case is brought in, your Honor, the statements that are being made by Mr. Lotz and by Mr. Smead to the Bank were in the performance or carrying out of the agreement they made with these parties at this time to see that their bills were paid.

The Court: I will offer a suggestion, if it is

(Testimony of Gerald A. Hatfield.)

approved by both sides. Let the testimony go in subject to a motion to strike and over your objections.

Mr. Bronson: Very well.

The Court: And unless this so-called conspiracy is established, counsel concedes that of course it wouldn't prevail. Am I correct in that?

Mr. McCallum: That is correct, your Honor.

Mr. Bronson: Yes, and here is another thing, your Honor, the motion might be based on, that even though there were a conspiracy in some respect not reaching this particular transaction, but we'll——

The Court: Unless it is connected up.

Mr. Bronson: We will agree.

The Court: Your objection covers it, on a motion to strike [132] from the record.

Mr. McCallum: Very well, your Honor.

The Court: If that is agreeable. Is that agreeable, gentlemen?

Mr. Bronson: It is agreeable, your Honor, if that is the order of the Court.

The Court: Well, you indicate a better approach and I will consider it.

Mr. McKinnon: I might add one point to the objection, if the Court please. There has been no adjudication of the lack of authority. Mr. McCallum in the case protested most highly that the agent Lotz had full authority to endorse those checks, and he tried the case upon that protestation, exactly opposite of the position he has just taken, and the

(Testimony of Gerald A. Hatfield.)

judgment was one whereby he stipulated to it. No adjudication of a lack of authority of the agent Lotz to sign those checks. I would like to add that to the objection we made at the introduction.

The Court: The record will so show.

Mr. McCallum: Q. Mr. Hatfield, I show you what is a photostat of a letter dated August 27th addressed to you by Mr. Lotz and ask you if that is a photostat of a letter you received from Mr. Lotz? A. It is.

Mr. McCallum: May I read this to your Honor, please? [133] This letter is on the letterhead of the American Fidelity and Casualty Company and it bears the date of August 27, 1951, addressed to Mr. Gerald A. Hatfield, vice-president, Mid-States Insurance Company, 182 West Lake Street, Chicago, Illinois.

“Dear Gerald:

“Enclosed herewith is a Travel Master Policy which covers you for \$25,000 on any land, air, or water conveyance as a passenger. The rate on this policy is cheaper than the other plans which you buy at the airports and it eliminates a lot of extra effort. I hope that this is along the lines of what you want.

“Now, Gerald, this bank that I am doing business with wants a resolution from your Board of Directors verifying that I have authority to endorse premium checks payable to Mid-States Insurance Company for deposit in my trustee account. I would

(Testimony of Gerald A. Hatfield.)

appreciate it very much if you would send this authorization to me by return airmail.

"I suppose you read about that terrible wreck with a United Airlines plane. Incidentally, that was the same plane that I took the evening when you took me to the airport, so I missed it one week. I have a date with you in Chicago in six months and I hope by that time that I will have the guts to fly in as I sure don't feel [134] so brave today.

"I am lining up some more high grade finance companies for you, and may also close a retrospective account in Los Angeles for you soon.

"With best regards, I am,

"Yours very truly, Joe Lotz."

May we offer this as the Anglo Bank's Exhibit first in order?

The Court: Indicate for the purpose of the record the purpose of that offer.

Mr. McCallum: The purpose of that offer is to prove that Mr. Lotz was asking for a specific permission from Mid-States Insurance Company on August 27, 1951, to endorse checks made payable to Mid-States Insurance Company.

The Court: Proceed.

Mr. MacCallum: Q. Mr. Hatfield, did you answer Mr. Lotz? A. Yes, sir, I did.

Q. I show you what is dated, a letter, September 5, 1951, apparently on your signature, and ask you if that is your reply to Mr. Lotz?

A. Yes, sir, this is the reply.

(Testimony of Gerald A. Hatfield.)

Mr. McCallum: I ask permission to read this to your Honor. It is on the letterhead of Mid-States Insurance Company and bears the date September 5, 1951, airmail.

"Mr. Joe Lotz [135]

"315 Fourteenth Street

"Oakland, California

"Dear Joe,

"This is in reference to your letter of August 27th in which you requested authority from our board of directors permitting you to endorse premium checks which are made payable to Mid-States Insurance Company for deposit in your trustee account. I am not saying that we will not grant you authority but I want to suggest that the simplest way to eliminate your problem would be for you to instruct whatever accounts you have who presently make their premium payment checks payable to Mid-States that instead such check should be made payable to you. In this manner there could be no question about your endorsing the checks and placing the funds in your trustee account.

"You are completely familiar with the Donnelly mess of a few years ago and one of the principle reasons such happened was because Donnelly had authority to endorse Mid-States checks. After being burned as we were on that occasion I am sure you will understand why we are most hesitant to grant such authority again. As the old saying goes "once burned—twice shy" such is certainly our case.

"Please, Joe, give this suggestion your earnest

(Testimony of Gerald A. Hatfield.)

[136] consideration and if there is any reason why you do not think it will work let me know at once. Best personal regards.

“Yours very truly, Gerald A. Hatfield, Vice-President.”

Mr. McCallum: We offer this, please, as plaintiff's Anglo Bank next in order.

The Court: Be admitted.

The Clerk: Intervening plaintiff's Exhibits 1 and 2 admitted and filed in evidence.

(Whereupon the letters above read into the record were admitted in evidence and marked Intervening Plaintiff's Exhibits 1 and 2.)

Mr. McCallum: Q. Mr. Hatfield, did you write another letter to Mr. Lotz on this same subject?

A. Yes, I wrote a second letter.

Q. I show you what purports to be a letter addressed by you to Mr. Lotz dated September 10, and ask you if you sent that letter to Mr. Lotz?

A. Yes, sir.

Mr. McCallum: May I read this to your Honor? This letter also is on the stationery of the Mid-States Insurance Company, dated September 10, 1951, airmail.

“Mr. Joe Lotz

“315 Fourteenth Street

“Oakland, California [137]

“Dear Joe,

“Under date of September 5th I wrote you on the subject of granting you authority to endorse premium checks which are made payable to Mid-

(Testimony of Gerald A. Hatfield.)

States. I overlooked giving you the most important reason in that letter as to why we are reluctant to grant you the authority you requested. That reason is that under our blanket bond we do not have any protection if we grant authority to any person not on our payroll to endorse checks. I am sure you can realize how important this can be to us and I am merely passing this additional information to you for your consideration." Then there is a personal paragraph.

Offer this as Anglo Bank's Exhibit next in order.

The Court: Admitted and marked in evidence.

The Clerk: Anglo Bank's Exhibit number 3 admitted and filed in evidence.

(Whereupon the letter above read into the record was admitted into evidence and marked Intervening Plaintiff's Exhibit number 3.)

Mr. McCallum: Q. Did you receive a reply from Mr. Lotz to either of those letters?

A. I received a reply to the first letter, the one of September 5.

Q. I show you what purports to be a letter addressed to you by Mr. Lotz and ask you if you received that from him? [138] A. Yes, sir.

Mr. McCallum: May I read this to the Court, just one paragraph that replies to these letters, the only pertinent part. This letter is on the stationery of the American Fidelity and Casualty Company dated September 8, 1951, addressed to Mr. Hatfield and the third paragraph reads as follows:

"Now, regarding my request for authority to

(Testimony of Gerald A. Hatfield.)

endorse check made payable to the Mid-States Insurance Company, we do not have very many like this, and those that we do have, we can have them made payable direct to me.”

May we offer this as Plaintiff’s Exhibit next in order?

The Court: May be admitted and marked.

The Clerk: Intervening Plaintiff’s Exhibit 4.

Mr. Bronson: I would like to have you read, if you will, save me the trouble, the last Exhibit, the paragraph you omitted to read, the second one, would you read that to the Court?

Mr. McCallum: I would be happy to.

Mr. Bronson: And give the Court the date of the letter.

Mr. McCallum: Dated September 8, 1951. Second paragraph.

“We are not sending the American Fidelity and Casualty Company any business whatsoever—you are getting it all. We are using some very rigid underwriting and hope that our loss ratio will reflect better as a [139] result of our close scrutiny. However, Gerry, we feel that the rates could stand another 10% advance as we are quite a bit below companies operating on a like basis. The Associated Veterans Insurance Company has quit doing business in Northern California; the Public Service Insurance Company is going on a more restrictive basis, and all along the line the companies are tightening up. So we would not experience any difficulty

(Testimony of Gerald A. Hatfield.)

with a higher premium. We could be very selective in the choice of our affiliations.”

Mr. Bronson: Thank you.

(Whereupon the letter above read into the record was admitted into evidence and marked Intervening Plaintiff’s Exhibit number 4.)

Mr. McCallum: Q. Mr. Hatfield, did the Mid-States Insurance Company commence an action against the Anglo Bank before this Court about the same time as this current action was commenced?

A. Would you read that? I didn’t get it all.

Q. Did the Mid-States Insurance Company commence an action in this same Court against the Anglo California National Bank?

A. Yes, sir.

Q. And was that action brought against the Bank in connection with certain checks which Mr. Lotz had endorsed and deposited [140] in his trust account in that Bank?

A. That is correct.

Q. I show you, Mr. Hatfield, what appears to be photostatic copies of several checks and ask you if those are the checks which were the subject matter of the Mid-States Insurance Company’s action against the Anglo California National Bank?

A. Yes, sir, these are the checks.

Q. Thank you.

Mr. McCallum: May we offer these, please, as the Plaintiff Anglo Bank’s Exhibit next in order?

The Court: No objection?

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: Well, all this is going in, I understand, subject to our——

The Court: Motion to strike.

Mr. Bronson: Motion to strike later, your Honor please?

The Court: They will be admitted and marked next in order.

The Clerk: Intervening Plaintiff's Exhibit 5 admitted and filed in evidence.

(Whereupon the checks above referred to were admitted into evidence and marked Intervening Plaintiff's Exhibit number 5.)

Mr. McCallum: May I call the Court's attention to these Exhibits, please? The first check is dated September 7, 1951, and is made payable to the order of the Mid-States [141] Insurance Company in the amount of \$5,547.25.

The second check is dated September 14, 1951, made payable to the order of Mid-States Insurance Company in the amount of \$67,500.

The third is dated September 24, 1951, payable to the order of Mid-States Insurance Company in the amount of \$11,250.

The fourth is dated September 28, 1951, and is payable to the order of the Mid-States Insurance Company in the amount of \$3,750.

The next is dated October 16, 1951, payable to the order of Mid-States Insurance Company in the amount of \$6,089.44.

Those checks are all made payable, or rather all drawn by the Public Service Company, and are the

(Testimony of Gerald A. Hatfield.)

so-called Public Service moneys that your Honor has been hearing about from time to time.

The other three checks, one drawn by Mr. George A. Fulmore, is dated November 16, 1951, made payable to Mid-States Insurance Company, in the amount of \$1,484.65, and the last two are drawn by Jackson Motor Sales, one dated October 13, 1951, payable to Mid-States Insurance Company in the amount of \$1,000 and one dated November 10, 1951 payable to Mid-States in the amount of \$800.00.

Each of these photostats show they have been endorsed [142] by Joe Lotz with a rubber stamp which the name, among other companies, appears Mid-States Insurance Company, Joe Lotz, trustee.

Q. And Mr. Hatfield, as a consequence of the action which your Company commenced against the Anglo Bank a judgment was entered against the Bank for \$37,500, is that correct?

A. That is correct.

Q. And as against those specific checks, which we just introduced, the Bank has paid your Company \$37,500?

A. That's correct.

Mr. McCallum: You may cross examine.

Mr. Bronson: Before I proceed with the cross examination if the Court please, there is a memorandum that has been prepared by my office which I mentioned to you at the start of the case. I don't propose, unless your Honor wants it, to interrupt the proceedings now, but I will hand it to your Clerk. It is very brief. Its virtue is brevity, and perhaps it will have more virtues, your Honor, but

(Testimony of Gerald A. Hatfield.)

you will have an opportunity to read that and I would like to have you do so, supplementing what I announced yesterday by way of opening statement.

The Court: Very well.

?

Cross Examination

Mr. Bronson: Q. Well, Mr. Hatfield, when did you tell [143] us this morning you first learned about the termination of business by Joe Lotz with the American Fidelity and Casualty Company?

A. I first learned of it in my conversation with Mr. Smead on December 4, I think is what I said.

The Court: '51.

The Witness: On December 4.

The Court: '51.

The Witness: '51, yes, sir.

Mr. Bronson: Q. Were you attentive to the reading of your last Exhibit, not the checks, put in by the Bank here? I call your attention to the first paragraph. It is addressed to you.

A. That's correct.

Q. What is the date of the letter?

A. The date is September 8. This letter, he merely mentions he is not giving American Fidelity and Casualty any business.

Q. What does that mean to you?

A. Means he simply quit of his own volition, doesn't mean, doesn't tell me they had cancelled his contract.

Q. You wanted them to spell it out that the

(Testimony of Gerald A. Hatfield.)

contract was cancelled, and when you referred to that this morning you were referring to the actual knowledge of the cancellation of the contract?

A. That's correct. [144]

Q. But you were aware on September 8 that they were getting no business right from the source of the business, Mr. Joe Lotz, weren't you?

A. That is what the letter states, yes, sir.

Q. You were aware of that when the question was asked you this morning about when they terminated their arrangements?

A. I must have been.

Q. In one of the letters here, Exhibit 3 or 4, that was put in in the early part of your testimony, there is a reference to somebody by GFC. What does that mean?

A. General Finance Corporation.

Q. And who is General Finance Corporation?

A. General Finance Corporation is our parent company.

Q. They own the Mid-States Insurance Company lock, stock and barrel? A. Yes, sir.

Q. And that is a finance company, is it?

A. Yes, sir.

Q. How big, are they nationwide?

Mr. Garrison: That is objected to as incompetent, irrelevant and immaterial—

Mr. Bronson: Withdraw it. It doesn't have any bearing upon this case.

Q. Now, I notice—this may be a little spotty, I will try to indicate to you, Mr. Hatfield, when I

(Testimony of Gerald A. Hatfield.)

am changing the [145] subject of my examination, because we can all get a little confused. This is on the subject that hasn't any direct bearing, but the last counsel that addressed questions to you noted each time that some correspondence appeared on the letterhead of American Fidelity and Casualty Company that came from Joe Lotz' office. You have seen that correspondence? A. Yes, sir.

Q. Here is an example of it, that is Plaintiff's Exhibit 1, and you see the designation American Fidelity and Casualty Company at the top, do you not? A. Yes, sir.

Q. What does it say right under that?

A. Joe Lotz, General Agent.

Q. Yes. Do you supply your general agents with similar stationery with the heading American Fidelity—I mean Mid-States Insurance Company?

A. We did at one time.

Q. Were you at this time in 1951?

A. I don't recall, Mr. Bronson.

Q. The fact that Joe Lotz, in writing to you, used the letterhead of the American Fidelity and Casualty Company had no significance, did it?

A. No.

Q. All right. Now, with regard to some testimony you gave yesterday, if not again today, you had reference to sub-standard [146] business.

A. Yes, sir.

Q. You remember the term being used both by yourself and by the questioner?

A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. Do you not? Well, substandard business can be profitable, can it not?

A. Any business can be profitable if it is written in the proper rate.

Q. Yes. Do your rates have to be approved when you are writing in California by the California Insurance Commissioner's office?

A. You do not have to have prior approval, no, sir.

Q. No, but you may be asked to justify a rate on a given type of exposure by that office, are you not?

A. That is correct.

Q. And you may justify your rate by your experience in writing it, is that true?

A. That's true.

Q. An on so-called substandard business—I will strike that for a moment.

The term might indicate anything from slightly, something slightly under standard to a deep deviation from standard risks, isn't that true?

A. Yes, sir. [147]

Q. And so the term substandard doesn't mean anything until you see how close to standard it is and on what rates it is written, isn't that true?

A. I go along with you on how close to standard it is, yes. I don't follow—

Mr. Garrison: Just a moment, let him finish his answer.

Mr. Bronson: I am going to let him finish, counsel.

(Testimony of Gerald A. Hatfield.)

A. (Continuing): I don't get what you mean by the rate.

Mr. Bronson: Q. Let me put it this way: It is perfectly acceptable business to an insurance company if it is properly rated, makes a profit, isn't that true? A. That's correct.

Q. And a large volume of Joe Lotz' business was substandard, was it not?

A. A relatively large volume.

Q. Yes. And that was true the day you first became acquainted with his business directly, that is, by the year 1950? A. Yes, sir.

Q. And you did take business profitably, did you not? A. Yes, sir.

Q. And you were glad to get the substandard business as long as it was profitable, weren't you?

A. Well, as long as it was offset by standard business, too. [148]

Q. Well, all right, but suppose it hadn't been offset by standard business at all, but the substandard business he turned in was all profitable, you would be glad to get it in that shape, would you not? A. Yes, sir.

Q. Now, you had a change of experience though, in Joe Lotz' underwriting in the beginning of the year 1951, did you not?

A. I think it was more about the middle of the year 1951.

Q. Well, I wouldn't like you to guess. Isn't it true you cast up every month as part of your office

(Testimony of Gerald A. Hatfield.)

accounting system, the loss ratios on a given general agent?

A. Isn't it true which? I didn't catch the question.

The Court: Read the question, Mr. Reporter.

(Record read by the reporter.)

A. That is true.

Q. So that every month of the year 1951 you knew what your loss ratio was on Joe Lotz' underwritings?

A. Yes, sir.

Q. Did you make it your business to look at them?

A. Yes, sir.

Q. Do you know what your loss ratio was with Joe Lotz on his underwritings in the first year 1947?

A. No, sir, I can't state that exactly; I would have to refer to the record. [149]

Mr. Bronson: If you will bear with me a moment, your Honor, I will see if I can assist the witness's memory on that and perhaps save trouble with reference to some accounting records.

Q. You remember testifying in the bank case on that subject?

A. No, I don't remember.

Q. Now, additional to the subject matter—well, here is the record. Withdraw that.

I have it here.

Mr. Garrison: May I see it?

Mr. Bronson: Oh, yes.

Mr. Garrison: Thank you.

Mr. Bronson: Should I read it and save time?

Mr. Garrison: Sure.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: I am going to read a portion of this—I have shown it to Mr. Garrison, your Honor, and save going through the routine of showing it to you and getting your approval. This is testimony taken in the bank case, page 176 of the volume I have here, and at the beginning of the morning session, May 11, 1953, ten a.m. I will try to excerpt the parts that are not on the subject. Question by McCallum:

“So in the continuity of events we would like to offer as part of Mr. Hatfield’s testimony the loss ratio [150] of the Joe Lotz Insurance Agency during the year 1947 as being 91.5 per cent.

“Mr. Garrison: Pardon me, before you give the figure, we object—” states grounds. Mr. McCallum argues. And then the Court:

“I will overrule the objection.

“Mr. Garrison: What is the figure?

“Mr. McCallum: 91.5.

“Mr. Garrison: Now, may my objection run to all these figures?

“The Court: Yes.

“Mr. McCallum: For the year 1948, 48.6; for the year 1949, 45.8; for the year 1950, 49.8; for the year 1951, 71.1.”

Now, of course the——

Mr. McKinnon: Mr. Bronson made an error, if I may call it to the Court’s attention, for the year 1951 it should be 71.1 per cent.

Mr. Bronson: Didn’t I read that?

Mr. McKinnon: You said 70.1 per cent.

(Testimony of Gerald A. Hatfield.)

The Court: I think he said 71. I accepted it as 71. Did you hear that, counsel?

Mr. McCallum: I thought he said 71.1.

Mr. Bronson: You will accept that correction?

Mr. McKinnon: Sorry, your Honor, I am the librarian, and [151] even librarians can make mistakes.

Mr. Bronson: Q. I am going to refer to the Public Service business briefly.

When is the first time that you heard about the Public Service rewrite?

A. When I received the group of daily reports in my own office.

Q. And that you fix as what?

A. November 27.

Q. Hadn't Mr. Joe Lotz told you about that in Chicago on August 14 or 15, 1951?

A. No, sir, he had not.

Q. Did he tell you he was taking on a large block of underwritings at that time and at that place?

A. No, sir, he did not.

Q. He was in your office, wasn't he, on August 15, 1951?

A. Yes, sir.

Mr. Garrison: Pardon me, Mr. Bronson, Mr. Hatfield said November 27, in reference to that date. He has previously testified to a different month, and I want to be sure.

Mr. Bronson: Are you correcting him?

Mr. Garrison: I am suggesting you give him an opportunity to correct the month if he made a slip.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: I am going to let you do it, if he needs correcting. [152]

Mr. Garrison: Q. What was the date?

A. September 27.

Mr. Garrison: You said November.

Mr. Bronson: All right.

Mr. Garrison: Even witnesses——

Mr. Bronson: Q. You want to be understood as saying when? A. Sir?

Q. Let us understand it, when did you say you first—— A. September 27, 1951.

Mr. Bronson: I am going to put it down to be certain.

Q. And you deny that Mr. Lotz either discussed a block of business by name or by not naming it as an underwriting that he was taking on at the meeting in Chicago that you say you attended somewhere around the middle of August, 1951?

A. Yes, sir, I deny that.

Q. It isn't that you can't remember it, you just know it didn't take place?

Mr. Garrison: If the Court please, the witness answered that question twice quite categorically. It seems to me it is arguing with him when he says can he remember or whether it didn't occur.

The Court: Are you positive about that?

The Witness: Yes, sir. [153]

The Court: Proceed.

Mr. Bronson: Q. All right. Now in any and all events as an officer of the company you can

(Testimony of Gerald A. Hatfield.)

cancel any business submitted to you by an agent at any time, isn't that right?

A. According to the terms of the policy contract, certainly.

Q. Yes. A. Yes.

Q. And you were free at any time to have the supreme authority to cancel any business, whether it comes in a single policy or in a large block, is that true? A. That's correct.

Q. And at the time you learned of this—of the Public Service underwritings, which you say was at the end of September sometime, was any immediate step taken to cancel them outright?

A. No, sir.

Q. You mentioned some delay between the time that the policies bore a date and the time when you saw them first in Chicago, is that right?

A. Yes, sir.

Q. And what period of time, roughly, was that?

A. Roughly two to three weeks.

Q. Now, how many Public Service policies in that group or portfolio were there roughly? I don't ask for the exact number. [154]

A. You mean in the entire portfolio?

Q. Yes.

A. Roughly about 1800 or 2000.

Q. And the first group you saw I believe you told the Judge was some six or seven hundred?

A. Yes.

Q. If that was done on a rewrite, let us say just

(Testimony of Gerald A. Hatfield.)

one girl working on it, could she do more than 40 or 50 a day?

A. You mean type 50 policies a day, is that what you're driving at?

Q. Yes, exactly.

A. A good girl can type about 50 policies a day, yes.

Q. Now, let us look at Joe Lotz. Do you know who prepared those policies?

A. I know they were prepared both in Mr. Lotz' office and in another office.

Q. They weren't done by the Public Service Company?

A. I don't know what other office it was, whether the Public Service or Russell and Bond.

Q. Russell and Bond have their office in Oakland, do they not?

A. No, it is in San Francisco.

Q. In San Francisco. Well, what became of those policies once they were written, where did Joe Lotz send them?

A. He sent them—you mean the original policies? [155]

Q. The rewrites.

A. Well, I mean you are talking about the original policies? Q. Yes.

A. He turned them over, over to—I can't answer, I don't know.

Q. Didn't they, as a matter of fact, go down to Los Angeles?

(Testimony of Gerald A. Hatfield.)

A. No, he didn't send the policies to Los Angeles.

Q. Aren't all the underwritings of Joe Lotz cleared through Los Angeles?

A. Well, I think what you are referring to is the daily reports and not the policies.

Q. What did you use first, a policy or daily report? A. Daily reports.

Q. All right. Where do the daily reports go first?

A. This particular group came direct to Chicago, to the best of my knowledge.

Q. What does that mean, that you don't know for sure?

A. No, I am pretty sure they came direct to Chicago.

Q. You mean that was a deviation from the normal order of sending them down to Los Angeles? A. Yes, sir.

Q. Well, how did that happen? Was there some instruction given to that effect?

A. No, sir.

Q. Well, then the delay in getting—first go to this. [156] The daily is prepared from the preparation of the policy itself, is it not?

A. Yes, sir.

Q. It is a carbon copy of the face sheet of the policy? A. That's right.

Q. So that whatever came forward to Chicago was something that was prepared as the policies themselves were being prepared?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

Q. And you could account, could you not, even on that first group that came through, with the delay in writing up the policy, the mechanics of writing up the policies themselves, and mailing them?

A. I could account for it—I don't know what you mean.

Q. You said two or three weeks delay, I thought some point was being made that Joe Lotz held back these policies for some reason, that is what I am getting at.

A. I think he did.

Q. As a matter of fact, you got for every day in the mechanics of the time it takes to do it—

A. If he had submitted those daily reports to us on a daily basis, as he was supposed to do, they wouldn't have come in a group of six or seven hundred all at one time, so they were held back.

Q. Weren't the group stopped and held up in Los Angeles, [157] as a matter of fact?

A. No, sir.

Q. Do you know that now? A. Yes, sir.

Q. A moment ago you said you weren't quite sure whether they came direct to you. You know it now, is that true?

A. I know it to the same degree I did a moment ago.

Q. Another matter on deviating. You mentioned the condition of Joe Lotz' account the year that you came there and referred to it as current. Is that true, 1950?

A. 1950, yes.

(Testimony of Gerald A. Hatfield.)

Q. I had some letters here that were produced for us which I am going to show you as a group.

Mr. Bronson: I will refer to this Exhibit, which we will put in evidence, if your Honor please, as a single Exhibit if there is no objection from counsel.

These are the so-called Dunning letters of 1950, and they comprise a group of about 20 letters, if the Court please.

Counsel, and my associate, calls my attention to the fact that some of them are wires. Would you look at these letters, please?

Mr. Garrison: We will stipulate, counsel, those were all sent and that they speak for themselves and may be introduced in evidence without any foundation or further [158] reference by the witness, and you may either read them or introduce them in a block.

Mr. Bronson: All right. I might say the examination by counsel was so different, that the letters show in almost every month in the year a dunning letter. In June there were two and in July there were three. In October, there were three, and in November there were two. In December there were three.

You can compare them later, if you wish.

Mr. Garrison: No. I think they speak for themselves, however.

Mr. Bronson: Yes, they do. But I want to point out to the Court some of these letters in this period

(Testimony of Gerald A. Hatfield.)

when the Mid-States' account was current, according to this witness.

Here is one of July 20, Joe Lotz, signed by Mr. Hamburg.

Q. Who is he, by the way?

A. At that time he was my underwriting manager.

The Court: This 1951?

Mr. Bronson: 1950, the year that this agency came under Mr. Hatfield's particular supervision and in which he has testified that the accounts were current for this year.

This July letter says:

"On July 12th we called your attention to the past due balance of \$14,754. We fully expected that [159] this account would be paid by now, however, we cannot find a record of your paying it."

The Witness: I think I should point out that is before I assumed control.

Mr. Bronson: The next letter I will read——

"Yes, but you testified about this, Mr. Hatfield, as I understood you.

"August 15 your account in the amount of \$15,076," and so on.

Telegram October 27. "We haven't received the check for \$21,000 odd past due August account. Remit as soon as possible."

September 26 wire shows a demand for a remittance of \$16,218 past due.

Mr. Garrison: If the Court please, I think counsel ought to read the letters, because the mere

(Testimony of Gerald A. Hatfield.)

fact that his account was not paid on the day due does not mean it was not ultimately paid and actually current and in fact the accounts were all paid.

Mr. Bronson: I have a little different idea.

Mr. Garrison: Read the letters.

Mr. Bronson: You mean read them in full?

Mr. Garrison: They are very short, just simply form letters.

Mr. Bronson: It is a simple matter, but I am going to [160] the assertion of this witness that it was a current account. We can test his veracity in more ways than one, counsel, certainly. That is the only point, if there is any argument about the propriety of these, your Honor.

I will read in full from now on. They are all addressed to Joe Lotz, and I will give the date and the contents of the message.

A wire June 27, 1950:

"Regret not having received \$131.80 December account and \$16,099.16 April account. Cannot understand delay. Please remit today."

July 26 wire, the day preceding:

"Regret not having received \$14,754 May account.

June account almost due. Please remit May account today."

Here is a letter dated June 9:

"Your April account in the amount of \$16,099.16 plus \$131.80 from December was due and payable

(Testimony of Gerald A. Hatfield.)

before the end of May, however, we cannot find where remittance has been received.

"We realize that it is easy to overlook items of this kind, however, we would appreciate your remittance for the \$16,230.96 past due account, within the next few days."

I will try to keep the rest of these in order, I didn't realize [161] they were so badly mixed up.

Here is a February 10 letter:

"Your December account in the amount of \$22,226.28 was due and payable before the end of January, however, we cannot find where remittance has been received.

"We realize it is easy to overlook items of this kind, however, we would appreciate your remittance for the \$22,226.28, past due account, within the next few days."

March 13 letter:

"Your January account in the amount of \$14,421.91 was due and payable before the end of February, however, we cannot find where remittance has been received.

"We realize that it is easy to overlook items of this kind, however, we would appreciate your remittance for the \$14,421.91, past due account, within the next few days."

May 19 letter:

"Your March account in the amount of \$31,114.75 was due and payable before the end of April, however, we cannot find where remittance has been received.

(Testimony of Gerald A. Hatfield.)

"We realize that it is easy to overlook items of this kind, however, we would appreciate your remittance for the \$31,114.75, past due account, within the next few days." [162] May 26, another letter:

"Under date of May 19, we called your attention to your past due account in the amount of \$31,245.85. We fully expect that this account would be paid by now, however, we cannot find a record of your paying it.

"Your next month's account is practically due as well so won't you please send us this past due account by return mail and if you prefer, include payment for the next month in your check. In any event, your March account must be paid as soon as possible."

I am going to omit reading these; counsel may if he is insistent upon it.

There is an October 17 letter referring to an August balance unpaid of \$21,706.

Another letter in October referring to the same August balance, and insisting upon the payment.

A November 21 letter referring to a September balance of \$18,404 unpaid.

A November 28, 1950 letter asking for the September balance of \$18,464.

A December 13 letter asking for the October balance of \$24,778.47, and referring to a few small items that I won't read.

A December 21 letter referring to the same balance still unpaid and ending with the paragraph:

"Since the end of the year is rapidly approaching

(Testimony of Gerald A. Hatfield.)

and we are most anxious to clear our records of items of this type, we ask that your check in the above amounts come forward as soon as possible.”

Here is another letter finally on the July—which is a duplicate of the others.

The Court: Take a recess.

(Short recess.)

Mr. Bronson: I offer these letters, which were read in whole or in part, as a single exhibit, our first in order.

The Court: May be admitted and marked.

The Clerk: Defendant's Exhibit A admitted and filed in evidence.

(Whereupon the group of letters above referred to were admitted into evidence and marked Defendant's Exhibit A.)

Mr. Bronson: Q. You stated this morning, Mr. Hatfield—I think it was this morning—in answer to a question by Mr. Garrison whether the transcript of the telephone conversation of October 31, 1951, which was read here by Mr. Garrison, contained all of the conversation you had. You recall that testimony? A. Yes, sir.

Q. That question. And you said no, you thought there was more on the disk and that you recalled that you asked Mr. Mark [164] Hart is Joe Lotz broke, and his answer was no, not that I know of.

Mr. Garrison: That is objected to, if the Court please, on the grounds Mr. Bronson has misquoted Mr. Hatfield in that Mr. Hatfield never referred to

(Testimony of Gerald A. Hatfield.)

a disk, because he doesn't know anything about how the transcript of the conversation——

Mr. Bronson: I will amend the question; the statement. It is only preliminary.

Mr. Garrison: Transcript, I think you mean.

Mr. Bronson: The transcript of it, yes. That would be the correct way to refer to it.

Now, at this time, if the Court please, I want to hand to the Clerk with the understanding he may deliver this to Mr. Garrison, an envelope containing a disk that I am holding up here. The envelope has our office heading on it and it is marked "Disk of phone conversation." The disk itself has a paster on it, 10-31-51, conversation M. Hart and Gerry Hatfield, and if I may, in view of that testimony, I will hand your Honor this record so that you may see the scoring on it made by whatever mechanism produced it, and the part that is un-scored.

The Court: All right.

Mr. Bronson: And as I stated, it is a machine called the Audograph, and there is an agency here in San Francisco [165] and can be taken there and reproduced into sound by counsel, if he wishes, and I hand it to the Clerk and ask it be marked our Exhibit next in order.

The Court: Be admitted.

Mr. Bronson: Confirmation of the correctness of the transcript counsel read from.

The Clerk: Defendant's Exhibit B admitted and filed in evidence.

(Testimony of Gerald A. Hatfield.)

(Whereupon the recording of the telephone conversation above referred to was admitted into evidence and marked Defendant's Exhibit B.)

Mr. Bronson: Q. Now, Mr. Hatfield, in that conversation that this transcript refers to there was a beginning and end of the conversation, was there not? A. Yes, sir.

Q. And there were some salutation words at the start and some sort of goodbye at the end of it, just as it was read? A. That's correct.

Q. All right. Now, you were shown an Exhibit—I won't try to find it here—but I think I can identify it, a new contract with Joe Lotz and your company dated September 1st, 1951. You have that in mind, do you? A. Yes, sir.

Q. And that was a contract that changed his privileges and [166] benefits in certain respects, did it not? A. That is correct.

Q. That is, as compared as to what he had enjoyed before and under that contract your retention of premium money was reduced from 15 per cent to 14 per cent, was it not?

A. Our retention, is that what you said?

Q. Yes. A. Yes, that's correct.

Q. And the settlement date was extended from 25 days to 75 days, was it not?

A. No, that is not correct.

Q. What was done?

A. Settlement date in that contract was 60 days.

(Testimony of Gerald A. Hatfield.)

Q. On that subject, had he enjoyed a 75 day settlement period prior to September 1?

A. Yes, he had.

Q And for how long had the 75 day period been in effect?

A. From May 1, 1951, until September 1, 1951.

Q. Did you have a written contract with Joe Lotz setting forth that particular change dated around May, 1951, or was that merely a verbal arrangement?

A. It was not only verbal, it was written in the form of a letter that I wrote to Mr. Lotz. However, I do not believe we ever got around to making up the amendment to that contract showing that change. In other words, that was an [167] amendment to his first original contract in effect.

Q When did you first discuss with him reducing your retention from 15 to 14 per cent?

A. That was first discussed in May of 1951.

Q. You have that letter?

A. I think we have it in our records, I am not sure.

Q. I didn't see your carbon copy of the letter, but I have the original here, I will show it to you and ask you if you can identify it. (Mr. Bronson showing letter to Mr. Garrison.)

Mr. Bronson: Q. I hand you the letter. Is that the letter you had reference to?

A. Yes, sir, this is the one.

Mr. Bronson: I will ask that be marked, and read it, your Honor please.

(Testimony of Gerald A. Hatfield.)

The Court: It may be admitted and marked next in order.

The Clerk: Defendant's Exhibit C admitted and filed in evidence.

(Whereupon the letter above referred to was admitted into evidence and marked Defendant's Exhibit C.)

Mr. Bronson: This is dated May 17, 1951, on the letterhead of Mid-States Insurance Company, 182 West Lake Street, Chicago. Mr. Joe Lotz, his address.

"Dear Joe,

"Because of lack of time this letter will be brief [168] but its purpose is to inform you of changes in your agency contract with us along the lines which we discussed during my recent visit with you. I have discussed the matters with Mr. Titus and I am pleased to advise that he has agreed with the changes I requested him to approve.

"Effective May 1st the Mid-States retention under your contract is reduced from 15% to 14%. With this additional 1% granted in your favor I trust you will show your appreciation by placing at least \$25,000 per month through Mid-States. Without a minimum volume of this amount coming to us I am sure you will agree that it will be hardly profitable for us to make this change. In our conversations you stated that this figure would be easily met every month and I know you will do your utmost to fulfill this statement. A formal amendment

(Testimony of Gerald A. Hatfield.)

endorsement to your contract will be forwarded to you at the earliest possible moment.

“We will also extend the terms of payment under the present contract allowing you 75 days for the payment of your premiums. In other words, the May premiums will be due and payable on or before August 15th and each succeeding month’s business will be on a similar basis. Now, Joe, with this extension in time of payment I hope you will see to it that such payments are received [169] by us no later than the date on which they are due and I hope it will never again be necessary for us to have to wire your office and request immediate payment. I think you should know that I had quite a difficult time in getting Mr. Titus to agree with these payment terms and his agreement to them is entirely contingent upon your performance in seeing that all future accounts are paid on or before the 75th day. In other words, if your account is not paid within the 75 days which this extension allows I am sure he will insist that the extension be canceled and the contract reverted to the original 30 day period. I do not want this to have to happen and I am sure you do not want this privilege retracted either and, thus, I am sure you will see to it that there will never be any cause for such action.

“As I told you in our conversation I am not able to duplicate at this time the guarantee commission amendment which you have on another contract. However, you stated this was not too important

(Testimony of Gerald A. Hatfield.)

from your point of view and I trust you are not disappointed in my inability to give you a similar agreement. Joe, I still would like a copy of it copied omitting the name of the company involved. All you need to do is copy the printed portion and omit the type written insertions and by doing this I do not think you will breach your word [170] pertaining to the amendment. I would like to show this to Mr. Titus because it is definitely a matter of competition which we have to face and, in my position, it is my prime duty to keep him informed of competitive conditions at all times. I will be sincerely grateful to you if you fulfill this request and of course, it will be held in the strictest confidence.

“Naturally, it is to our mutual benefit that the contents of this letter be held in strict confidence by you. I am trusting that you will not use the reduction in our retention as a wedge to secure a similar reduction in other contracts. It is not the purpose of the reduction we are granting you to start a war between retrospective companies as respects rates of retention and, for that reason, I am requesting that you do not divulge this information to anyone. I am sure, also, that you realize what an embarrassing spot I would be in if certain other agents should get wind of this change. Consequently, your secrecy on this factor is of utmost importance.

“I wish to thank you for the very enjoyable visit——”

(Testimony of Gerald A. Hatfield.)

I will omit that unless you want it, it is personal.

Mr. Garrison: No.

Mr. Bronson: That's Defendant's Exhibit C.

Q. Now, as you say there you wanted a minimum of \$25,000 a [171] month in gross premiums in order for Joe to earn—Joe Lotz to earn this reduction of one per cent in the Company's retention, right? A. Right.

Q. And in May it is true you were promoting him to write more and more business for you, is it not? A. That's true.

Q. And it is true you were doing that in June and July and August and September, also, is it not?

A. I can't answer that definitely, I would have to refer——

Q. Let me take it month by month. Weren't you promoting more business, for Joe to write more and more business in Mid-States in June?

Mr. Garrison: If the Court please, he just answered that question by saying he can't say offhand whether he was during that period or not. If counsel has some letters to Mr. Lotz I think he ought to produce them. He says he doesn't recall.

Mr. Bronson: A lot of help by way of an objection. I would like to know the grounds of the objection, your Honor.

Mr. Garrison: The grounds are that the question has been answered—asked and answered. He couldn't tell you whether he did during that period or not.

(Testimony of Gerald A. Hatfield.)

The Court: If he knows he may answer. Proceed.

Mr. Bronson: Q: Did you by letter, by telephone, by [172] agent or by employee of the Company call on Mr. Lotz in June soliciting him to write more business with Mid-States?

A. I do not recall.

Q. Did you in July by any of those means?

A. This is 1951 we are talking about?

Q. Yes, of course, it is the second month following the letter I just read.

Mr. Garrison: If the Court please, I suggest counsel's suggestion "of course it is" is unnecessary and redundant.

Mr. Bronson: Withdraw the "of course". I am referring to that year, Mr. Hatfield.

The Court: That is a trifle aggressive.

Mr. Bronson: I am afraid so, your Honor. I benefited very readily as soon as counsel made his objection. He guards his witnesses quite well, your Honor; counsel does.

The Court: What is it?

Mr. Bronson: He guards the witness quite well.

The Court: I don't think the witness needs any guarding.

Mr. Bronson: Well, maybe not.

The Court: I have listened to him for a couple of days and he is beyond the average, well beyond the average, very capable of taking care of himself.

Mr. Bronson: Q. Have you the question in mind, Mr. Hatfield? [173]

(Testimony of Gerald A. Hatfield.)

A. Yes. I cannot recall specifically, no.

Q. Well, let us take August. Would your answer be the same? A. Yes.

Q. 1951, I mean? A. Yes, sir.

Q. And September, 1951? A. Yes, sir.

Q. Just wouldn't know whether you communicated with him through yourself by any means, or through any other officer or agent of the Company?

A. Well, I would say this: In August in '51 when we first discussed giving him a new contract, of course we had in mind getting more business from him.

Q. You were anxious to get more business from him, or it was your concern or interest, was it not?

A. Yes.

Q. Well, now, when you increased his settlement—May I sit down—when you increased his settlement period, Mr. Hatfield, why did you do that? That is, when you raised from 25 days to 75 days?

A. Well, there are two or three answers to that. First, because he asked for it, and he pointed out in his request that he was having trouble getting his brokers and sub-agents to remit within 25 days so he could pay us. Also, he told me [174] he had received the same kind of consideration prior to that from our competitors, the American Fidelity and Casualty, and it was necessary for us, for me to do it to meet competition.

Q. Then can I summarize the thing in this wise:

(Testimony of Gerald A. Hatfield.)

In 1951, before you allowed him 75 days, you knew that he was floating on your business?

Mr. Garrison: That is objected to, if the Court please, on the ground what counsel means by floating has not been established——

Mr. Bronson: Withdraw it.

Mr. Garrison: ——by this witness——

Mr. Bronson: Withdraw it.

Mr. Garrison: ——and the actual understanding in insurance nomenclature. It is a term that counsel seems to enjoy using, because it apparently connotes some kind of—what he said the other day—to be kiting, I think, was the suggestion.

The Court: What is your understanding of the phrase “floating”?

The Witness: I never in my business consider the word “float”.

The Court: You have no conception of what it means?

The Witness: I know what it means, yes, sir.

The Court: What does it mean? [175]

The Witness: Means using someone else’s money in the interim period before it is due.

The Court: Proceed, gentlemen.

Mr. Bronson: Now, will you state the question that brought the objection, please?

(Record read by the reporter.)

Mr. Bronson: Q. In the light of the explanation you gave Judge Roche, is that true or not?

A. No, I don’t believe it is.

(Testimony of Gerald A. Hatfield.)

Q. Well, what does that mean, you just haven't any knowledge at all?

A. I mean I knew that he had a 25 day credit period, yes.

Q. Let us go back to these letters I read showing that during 1950, far from being current, he was being jacked up for balances running between 3 and 4 thousand dollars and \$21,000. You weren't in any doubt, were you, Mr. Hatfield, that that showed that he didn't have enough money in the bank to settle with you on the day he was supposed to settle, isn't that true?

Mr. Garrison: Objected to on the ground that counsel has interpreted the letters entirely against the tenor of the letters, and a misinterpretation of the meaning. The witness said that Mr. Lotz' account was current. Those letters simply are collection letters calling the agent's attention to the amount of his balance, and in those instances [176] that balance was two or three or four or ten days overdue. The evidence is, the fact is that the account was always paid, the money was ultimately always paid, and while some collection efforts were required, the accounts were never in default. Now, that is the obvious meaning of those letters and the suggestion that the account was not current seems to me to be wholly inconsistent with the evidence.

Mr. Bronson: Just a speech, your Honor, to help the witness out. That is my challenge.

(Testimony of Gerald A. Hatfield.)

The Court: Nothing unusual about that in these cases.

Mr. Bronson: No, but we don't like it—I don't like it.

The Court: Let us proceed.

Mr. Bronson: Will you state the question?

(Record read by the reporter.)

A. I had no knowledge of whatever amount he had in the bank. Those letters—I mean, his failure to pay right on the dot simply meant to me he was slow in paying, for whatever reason it was, I don't know.

Q. He was current, to you?

A. Yes, he was current in my opinion of the word current.

Q. All right. Now, let us get down to May, 1951, when you wrote this letter, which is Exhibit C, and when you changed his settlement period from 25 days to 75 days did you know then that he had been floating his business, [177] including his own commission, his agent's commission and his overhead on his office on his principal's money, on the insurance company's money?

Mr. Garrison: That is objected to, if the Court please, on the grounds it is assuming something not in evidence.

The Court: If he knows. Objection overruled.

The Witness: No, sir, I do not know.

Mr. Bronson: Q. You say the only reason you increased it was that he asked for it?

A. He asked for it, and to meet competition.

(Testimony of Gerald A. Hatfield.)

Q. And did you ask him why he wanted it raised from 25 to 75 days?

A. I probably did, I don't remember exactly.

Q. What did he say, if your memory serves you, when you asked him why he had to have all that time considering the amount of time you were giving him up to that time?

A. I think I already answered that question.

Q. You mean to say it was just to meet competition?

A. No, in my first reply to that question I stated that he told me that his sub-agents and brokers were so slow in paying their bills to him that he needed the extension of time in order to be able to remit to me on time.

Q. As a matter of fact, the great bulk of that business that he had from his sub-agents was cash within 30 days, [178] isn't that right?

A. I wouldn't know that; I don't know.

Q. You don't know it? A. No.

Q. Do you know how automobile finance business is written, that the mortgagee, or the conditional sale vendor, collects the premium with the writing of the contract of sale of the automobile?

A. I do.

Q. Well, now, you followed enough of this business of Joe Lotz to know that the great bulk of the money, the premium money that he received from sub-agents came with or immediately following the notice of the writing of the business, don't you?

(Testimony of Gerald A. Hatfield.)

A. No, I can't say that I do know that.

Q. You stated that the first time that you knew that Mr. Lotz was in New York and saw Mr. Hart there, the president of the American Plan, was on November 27, 1951. You gave that testimony this morning, isn't that true?

A. I don't remember whether that was the exact date or not, but it was around that time, yes.

Q. When you were out there at the end——

A. That's right.

Q. ——at the end of November.

I will read you this part in that connection, the [179] transcript of that record I have just put in evidence. This is part of the conversation you had on the telephone with Mr. Mark Hart on October 31. It follows the expression:

"Hart: And I said, 'God bless you, go ahead.'

"Hatfield: Yeah.

"Hart: And I told you that before, because we weren't trying to get the whole thing. But he's got a better deal with you. I can't give him that deal. He came to New York and told me what you offered him."

Q. Do you recall Mr. Hart saying that to you on the phone?

A. Must have been said, it is in the transcript. He doesn't say when he came to New York.

Q. No, but at least you knew about it on October 31, the date of that telephone call, didn't you, that he had been to New York and talked, that is,

(Testimony of Gerald A. Hatfield.)

Joe Lotz had been to New York and talked with Hart?

A. Yes, but I didn't know what time he had been in New York.

Q. All right, let us go back. In any conversation on August 15, or 14, when he was in your office following his trip to New York, did Mr. Lotz mention to you that he had been in New York on that occasion?

A. No, sir, he did not.

Q. I am referring you to another portion of that transcript on another subject, Mr. Hatfield. It is right at the—very close to the start of it. Mr. Hart said to you:

“And they tell us that their deal with Mid-States gives them a 15% prepaid commission, so it's somewhat to his advantage to be able to rewrite this stuff. He's asked me if he could write it flat—he can't cancel flat.

“Hatfield: Yes.

“Hart: And I've said 'yes' and particularly so—and very frankly, Jerry, that he hasn't paid us for the premium.

“Hatfield: (Laughter)

“Hart: He's told you that, I believe.

“Hatfield: Yeah * * *”

Q. You remember that conversation?

A. Yes, sir.

Q. Well, then, Mr. Hart was not representing to you that his account with Joe Lotz at the time of this conversation was current, was he?

A. Yes, he was later on.

(Testimony of Gerald A. Hatfield.)

Q. You are referring to his statement of the due days? A. Yes.

Q. Get to that later. Now, I call your attention to a statement you made in answer to a question by Mr. Garrison as to the status of your account with Lotz in October, 1951, and your answer was that he was current then. Do you remember [181] that?

A. Yes, sir.

Q. Actually he owed you, on September 15, his balance on May business,—I mean on June business was \$29,000, approximately, at the time you referred to, did he not?

A. I would have to see the record, I don't know.

Q. Well, we will produce that.

Now, you testified to some scolding, or at least some reproach that you gave to Joe Lotz about not telling you that he was in New York talking to Hart. You recall that testimony?

A. Yes, sir.

Q. Well, is it your contention to this charge that Mr. Lotz should tell you every time he takes a trip to New York and who he sees?

A. Under ordinary circumstances, no, but under this circumstance I feel he should have.

Q. Well, you wouldn't expect him, if he took a trip on your business to see you, that he would have to go and tell Mr. Hart about it, would you?

A. Not in the ordinary course of business, but he was certainly concealing something from me in this instance.

Q. Now, Mr. Hatfield, you testified that some

(Testimony of Gerald A. Hatfield.)

members of your organization visited Lotz every month; is that true? A. Approximately.

Q. During the course of your agency, and who were, who would [182] those individuals be?

A. At one time Mr. Kledzik, and later Mr. Oldberg and Mr. Kledzik together.

Q. That was a routine visit that was made?

A. Yes, sir.

Q. And then other officers of your Company visited them, did they not, Mr. Cass?

A. Well, prior to my time, yes.

Q. Mr. Donnelly? A. Yes.

Q. And you said that you made a couple of trips a year after you came into this supervision scheme?

A. Yes, sir.

Q. And did Mr. Titus come?

A. The first time Mr. Titus came out here was in December of 1951.

Q. Didn't you ascertain, referring to the period of 1950 and 1951, that Joe Lotz was paying commissions up to 30 per cent to his sub-agents?

A. No, sir, I did not.

Q. Didn't you ascertain that his business operations were costing him at least 10 or 12 per cent of the premium dollar? A. No, sir.

Q. Didn't you ascertain what your loss ratios were month by month during 1950 and 1951? [183]

A. Yes, sir.

Q. When your loss ratios—your loss ratios increased sharply, did they not, beginning with 1951?

(Testimony of Gerald A. Hatfield.)

A. Sometime during '51; I don't know whether it was the beginning or not.

Q. Did you examine at that time—well, you know that they were running as high as 70 per cent and over during that year, did you not?

A. At the end of the year that was the loss ratio.

Q. Let us take in August and September; wasn't your loss ratio running as high as 70 per cent?

A. I do not know, I don't have that record with me.

Q. Well, let me ask you this: Did you ever make any examination up until the end of October to ascertain what he was paying to acquire business from his sub-agents? A. No, sir.

Q. And you insist that you didn't have any knowledge of any shaky condition of Joe's finances until the month of November 1951, is that right?

A. Yes, sir.

Q. And nobody in your organization ever brought you any information that that was a shaky account, is that right?

A. What do you mean by "shaky account"?

Q. Well, I will put it in better language. No one ever reported to you any danger, that is, in your own organization, [184] of continuing in business with Joe Lotz on account of his financial condition?

A. I don't recall any such report.

Q. Didn't you, when you first came into the Joe Lotz sphere, ask for an audit of his books?

A. No, sir.

(Testimony of Gerald A. Hatfield.)

Q. At any time when you thereafter, that is, from October, 1950 on until the end of November, did you ask for an audit? A. No, sir.

Q. Didn't you ask for any audit during the year 1951 at any time?

A. We asked for an audit at the end of 1951.

Q. No, but down to the end of October, 1951, is it your testimony that neither you nor anybody on behalf of your Company asked for any audit?

A. It is my testimony that I did not ask for any audit. I do not know—

Q. Let me ask you specifically—what?

A. I do not know whether anyone else in the company did or not.

Q. Well, the period that I mention, October, 1950, on to the end of 1951, you were the general manager and vice-president?

A. That is correct.

Q. And under your specific concern were the agency accounts? [185] A. Correct.

Q. Were they not? A. Correct.

Q. Well, now, are you stating that first that you asked for no audit yourself during that period?

A. That's correct.

Q. Did you ask anybody else to procure an audit from Lotz or Lotz' books?

A. I do not recall any such request.

Q. You don't recall any? A. No.

Q. Well, then, so far as your state of mind goes now that the Company, by yourself or any agent or officer of it, never initiated any proceedings to

(Testimony of Gerald A. Hatfield.)

examine the books of Joe Lotz to ascertain where he stood at any of the period I mentioned?

A. To the best of my knowledge, that's correct.

Q. And when this incident occurred in May, 1951, when he was back there telling you that he could get 75 days' time from other companies and would you give him 75 days, you went ahead and gave it to him, did you? A. That's correct.

Q. Without any thought of examining to what extent you were jeopardizing the Company's interest in so doing?

A. Our past experience hadn't indicated any such examination [186] was necessary.

Q. Well, I don't want to argue and I hope I won't promote an objection on that score, but Mr. Hatfield, when the man asked for 75 days, and according to you said it was a matter of competition or some other thing, you weren't under any doubt at all that he needed it to float his business to pay his agents and to keep his head up, now, isn't that true? A. No, that isn't true.

Q. And when you placed the \$25,000 a month minimum on the business he wrote in May and when in August you told him you wanted more and more business, actually your prime interest was getting premium volume into Mid-States, wasn't that right?

A. For good business, that is correct.

Q. It was good business?

A. No, I say we wanted good volume, that is correct.

Q. Well, as a matter of fact,—I hate to use the

(Testimony of Gerald A. Hatfield.)

term—but you were premium hungry, weren't you, at that time? It was a policy of the Company—I will put it this way in lieu of the other—it was a policy of the Company to go out and give more time to these people in order to get more business in, right?

A. Now, Mr. Bronson, I don't want to argue either—I am as passive a man as you—but this man had been an agent source for us since 1947 and an account we valued had [187] been taken away from us, and I was anxious to get it back. That is the whole sum and substance of it.

Q. That is a very satisfactory statement.

Mr. Garrison: I think it is likewise.

Mr. McKinnon: Well, I don't, as long as you are commenting, object to voluntary statements. That is the only way to balance it off.

Mr. Bronson: You see, I would be lost without Mr. McKinnon here.

Q. I am calling attention to a portion of the transcript in the bank case at page 79.

Mr. Garrison: 79?

Mr. Bronson: 79, yes. This is your testimony. May I read it or shall I show it to him first?

Mr. Garrison: Okay, go ahead.

Mr. Bronson: You know, your Honor, we get in the bad habit, you know, in that other building, where we get so many bad habits, of straying from the lectern.

The Court: No set procedure here. Some of my associates are more severe, but I am rather liberal.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: All right, thank you, Judge.

I am reading from page 79, line 19 of the testimony in the bank case given on May 7, 1953.

"Question: And is it true then, you knew in January of 1951 that he was paying as high as 30 per cent [188] to his sub-agents?"

Answer by yourself, "Yes, sir."

Mr. Garrison: Mr. Bronson, I think in fairness to the witness you ought to let him refer to his testimony on that subject and be sure that you are talking about the same kind of information.

Mr. Bronson: When should I do that?

Mr. Garrison: Right now.

Mr. Bronson: All right. Want we to hand him the book?

Mr. Garrison: Let him look at it, identify the subject matter, because we are talking about something else.

Mr. Bronson: I want to be quite fair.

Mr. Garrison: I am sure you do.

(Mr. Bronson handing transcript to the witness, and the witness reading to himself.)

The Witness: So that the record may be clear, it is true that answer was given in this testimony, but that answer, I shall go on to explain further, applied to only one phase of business known as trailer home business.

Q. What?

A. Known as trailer home business.

Q. That is what you intended in that statement, is it?

(Testimony of Gerald A. Hatfield.)

A. Yes, farther on down it is, and furthermore, in this testimony you will find that I referred to a letter I had [189] written in January of 1951 wherein I had advised Joe that I had heard it rumored that he was offering 30 per cent commission, not that he had been paying it.

Q. What is the date of the letter?

A. January 25, 1951, and it pertained only to trailer home business on which any agent can pay 30, 35 or 40 per cent commission and make money.

Q. Mr. Hatfield, if he offered 30 per cent to an agent, sub-agent as a commission, there isn't any doubt about the sub-agent accepting it and with alacrity, is there?

A. Let me elaborate more on that letter. In that letter I was remonstrating with him for offering it and telling him not to offer such a rate of commission, because it wasn't necessary.

Q. Now, then, are you prepared to state what the average commission for the year, that is to sub-agents, the average commission that Joe Lotz' agency paid that was cast up by your auditors?

A. The average commission to what?

Q. That Joe Lotz paid to sub-agents for the year 1951?

A. No, I am not in a position to state what it was.

Q. Well, we will produce that, just to remind you that the average he paid to his agents was 26—nearly 27 per cent. Do you recall the figure produced by your auditor?

(Testimony of Gerald A. Hatfield.)

A. No, I don't recall ever seeing that figure.

Q. Here is a letter, photostat of a letter of August 17 written to Ray Titus from Dick Cass. Are you familiar with that matter, has it ever come to your notice so you can identify it? Mr. Titus is here in the courtroom and proposes to stay to the end of the trial, does he? A. Yes, sir.

Q. Well, I can take it up with him if you don't recognize it.

I will ask you to identify that as a photostat of a letter written by you?

A. Yes, sir, it is a copy, a memorandum I wrote to Mr. Hamburg.

Q. Mr. Hamburg is an employee of your company? A. He was at that time.

Mr. Bronson: We will offer that, if the Court please.

The Court: May be admitted and marked.

The Clerk: Defendant's Exhibit D admitted and filed in evidence.

(Whereupon a letter dated July 3, 1951 above referred to was admitted into evidence and marked Defendant's Exhibit D.)

Mr. Bronson: This is a letter, apparently inter-organization, your Honor, from Mr. Hatfield to Chuck Hamburg on July 3, 1951.

"Chuck, under date of May 17th I sent you a copy of my letter to Joe Lotz in which I advised him that we [191] would reduce our retention from 15% to 14% provided he wrote at least \$25,000 per month with Mid-States. In the same letter I also

(Testimony of Gerald A. Hatfield.)

agreed to extend the terms of payment of premiums to us in 75 days in lieu of the previous 25 day provision in his contract. Formal amendments to the contract are now being prepared by the legal department. The purpose of this memo is to advise you to watch carefully and see that premiums are remitted to us within the 75 days we are allowing because if Joe does not pay within 75 days then this extension will be void and the contract will revert back to the original 25 day period. Please call to my attention immediately if the premiums are not received by us within the 75 days allowed."

Q. I have a letter here June 7 purporting to be, Mr. Hatfield, from you to George Kledzik in Los Angeles. Will you read that, please, and tell me if you have, or can produce the letter that is referred to in there, or the statement that is referred to in—withdraw that.

First let me ask you is that a letter you wrote to George Kledzik?

A. Interoffice memo, yes.

Mr. Bronson: All right, I will put it in evidence now that it is identified. Will you mark that, please?

The Court: Be admitted and marked. [192]

The Clerk: Defendant's Exhibit E admitted and filed in evidence.

Mr. Bronson: I want to read this, if the Court please.

(Whereupon the letter above referred to was admitted into evidence and marked Defendant's Exhibit 3.)

(Testimony of Gerald A. Hatfield.)

“George, since writing you my three page long-hand memorandum last week, Ray and I have discussed the matter of Joe Lotz representing us in the Los Angeles area as respects making direct retrospective appointments. Both Ray and I feel we do not want him acting in this capacity because, confidentially, we do not think he is the type or caliber of an individual who should be representing us. We feel that you can do a much better job, making a much better impression upon prospective accounts and at the same time eliminating the underrate commission which we would have to pay Lotz. Therefore, I think you should tell him definitely that we are not interested as respects the Los Angeles area but, if he has prospects for making direct contacts with Mid-States in his own territory, we will be happy to give him the same deal he has with American Plan.

“George, on your June 15th paycheck you will see a nice increase”—well, that is personal.

Mr. Garrison: That is personal. [193]

Mr. Bronson: We will omit that.

Q. Now, first and foremost, where is the three page longhand memo that you wrote a week before this June 7 day?

A. I don't have any idea.

Q. Well, were you present when we sent a young man from our office back there with an order of court asking you to produce documents of the kind referred to in here?

A. Yes.

Q. Did you look all over for it?

(Testimony of Gerald A. Hatfield.)

A. Absolutely, searched high and low for it. I don't think any copy was ever made. I think it was a personal memo between me and Mr. Kledzik.

Q. Wouldn't it get in the file?

A. Well, could be in his file.

Q. Whose? A. Mr. Kledzik's file.

Q. We asked you to produce all the records of the Company, wherever they were, respecting Joe Lotz for the period 1947 down to the end of 1951.

A. How could I produce something Mr. Kledzik had since he was no longer our employee, gone for over a year.

Q. I suppose you had an office down there?

A. Not down there any more, no.

Q. What did they do, throw it all in the scrap office when he closed or left? [194]

A. I don't know.

Mr. Garrison: Object to that on the ground it is argumentative.

Mr. Bronson: Well, no, I mean it——

Mr. Garrison: Immaterial issues in this case.

Mr. Bronson: We have a lot of documents we failed to get, but I want the one here where they were turning Joe Lotz' business down on the basis they mentioned here, and he has got a longhand three page memo, we want to see that.

Mr. Garrison: If the Court please, Mr. Hatfield wrote one of their former employees a longhand memo. Now that gentleman, I don't know where he is, he is no longer in our employ, and he took that memo, and no copies were made of it. We don't have

(Testimony of Gerald A. Hatfield.)

the memorandum any more. It went to the man to whom it was addressed. Why Mr. Bronson thinks that would be in our files, I don't know. Mr. Kledzik received it.

The Court: Who wrote the letter?

Mr. Garrison: Mr. Hatfield wrote the longhand letter to Mr. Kledzik—when did you write the letter, what is the date of that one?

Mr. Bronson: This is June 7, 1951.

The Witness: I presume it was in June, 1951.

The Court: Do you recall what you wrote? [195]

The Witness: I don't have any idea. I think it was purely—I don't think it would have anything to do with Joe Lotz, I think it was purely personal, I couldn't state definitely.

Mr. Bronson: Q. No copies made of it?

A. No, sir.

Mr. Garrison: Do you know where you were when you wrote it?

The Witness: I presume I was in Chicago, but I am not certain about that.

The Court: It is time to take the adjournment.

(Thereupon this case was adjourned to Wednesday, May 5th, 1954, at the hour of 10:00 a.m.) [196]

The Clerk: Gerald A. Hatfield, to the stand, heretofore sworn.

GERALD A. HATFIELD

a witness for the plaintiff, having been previously duly sworn resumed the witness stand for further cross examination.

Cross Examination—(Continued)

Mr. Bronson: Q. Mr. Hatfield, to clear up one matter, I have in my hands a copy of a report of Lester, Herrick and Herrick, the certified public accounts of this city, dated January 21, 1953. Would you look at that briefly and tell me whether you are familiar generally with that account that has been gotten up?

Mr. Garrison: Let me take a look at it, Mr. Bronson.

Mr. Bronson: I thought you had the identical thing.

Mr. Garrison: I do, if it is the identical thing.

Yes, we will stipulate that this audit was made by Lester, Herrick and Herrick at our request, and that it is complete and may be used without foundation.

Mr. Bronson: Thank you very much.

Mr. Garrison: You may read from it, or refer to it.

Mr. Bronson: I only want to read from it with reference to one matter that has reference to some of the testimony of [198] the witness on direct examination.

Mr. Bronson: Q. Now, on page 19 of the re-

(Testimony of Gerald A. Hatfield.)

port, Mr. *Garrison*—May I step up and be on the stand with the witness?

The Court: Be right at home here.

Mr. Bronson: Your Honor has the knack of making people feel that way, but would still like your okay.

The Court: It has been passed around generally I am supposed to be pretty severe.

Mr. Bronson: Not until you get into trouble with the United States Government, that is the only place that might be true.

Mr. Bronson: Q. Now you testified—is there a slip in there?

Well, I think on page 19 there is a schedule called “Summary of Insurance Written For The Period December 1, 1950 to September 30, 1952”, and that’s columnized on the left by the months of the years that I referred to in the title, and then the next is a column of totals, and then there are three columns, the first called “Mid-States Insurance Company”, next “American Fidelity and Casualty Company”, and the third column is “Other Companies”.

Now, if I may read into the record with you the underwritings for Mid-States, month by month, beginning in January 1951, down to and including August, 1951. This is Mid-States. January, 16,661—I will leave off the pennies in each case; [199] February, 13,932; March, 14,976; April, 433; May, minus 2,719; June, plus figure of 32,160; July,

(Testimony of Gerald A. Hatfield.)

minus figure of \$2,455; and August, plus figure of 34,252.

The same months, January to and through August for American Fidelity and Casualty, January, 12,591; February, 15,971; March, 20,081, April, 25,713; May, 83,753; June, 46,050; July, \$85,785; and August \$50,481.

Mr. Bronson: Q. You have the totals of those?

(Colloquy between counsel; inaudible to the reporter.)

Mr. Bronson: Q. Now, with regard to your testimony of yesterday, or the day before, that the account of Joe Lotz with your company, Mr. Hatfield, was current during the year 1950, I'm calling your attention to some testimony you gave in the trial of the bank case in this Court in May of last year, appearing at page 74. I think at the time, if I am not mistaken, you were being examined by Mr. McCallum. This starts at line 15:

"Isn't it a fact that Mr. Lotz was often delinquent in his payments?"

Your answer:

"He was delinquent during the year 1950 quite frequently, yes.

"Question: And also in the year 1951?

"Answer: No, sir, not in 1951."

And now, you gave that testimony, of course, at that time? [200]

Mr. Garrison: If the court please, may not the witness explain that answer, if he wishes to?

(Testimony of Gerald A. Hatfield.)

A. I gave the testimony at that time, yes. It is in the record there.

Mr. Bronson: Of course, when the witness doesn't suggest explaining, counsel interrupts in the nature of a guidance of him, Your Honor, and he has the right of redirect examination. It is an interruption of the orderly presentation of the cross examination. I don't mean to be captious about it, but it seems to me those suggestions shouldn't be made by counsel.

Mr. Garrison: My only point was that he asked the witness a question and the witness said "yes", but before he got a chance to complete his answer he proceeded on to another subject. He should have a right to clear up any apparent differences in that answer and his present testimony, if he wishes. That was my point.

The Court: Nothing before the Court, gentlemen. Proceed.

Mr. Bronson: Q. All right. Now, in connection with your statement——

"Question: And also in the year 1951?"

"Answer: No, sir, not in 1951."——

A. By that answer I meant he wasn't frequently, my answer previous to that that he was frequently delinquent in 1950, and when I said, "No, not in 1951," I meant he was not frequently delinquent in 1951. [201]

Q. I didn't catch any reference to "frequent" here.

(Testimony of Gerald A. Hatfield.)

“He was delinquent during the year 1950 quite frequently.”

A. Quite frequently, yes.

Q. Now, do you mean by delinquent in 1950 that he was current in 1950?

A. I mean this, Mr. Bronson: Current to me means——

Q. Answer the question first before you make your explanation. Does delinquent mean the same thing as current?

A. It does to me, yes.

Q. All right. You can explain it.

A. The reason I say that current to me means when an agent pays—perhaps he is slow—pays but he pays within a reasonable time and without any undue pressure on our part to get him to pay, and that is the history of the Joe Lotz agency. He always paid us, never had any extreme argument to pay us, never defaulted at any time, all it ever took was a series of form letters to get him to remit.

Mr. Bronson: Ask that the last part of the answer go out.

The Court: He wanted to explain his answer.

Mr. Bronson: All right.

The Court: No question there was a series of letters here, but in my mind it is pressing him pretty hard for the money, isn't that a fact?

The Witness: Well, they are form letters; we watched the agent's account, Your Honor. [202]

The Court: I understand that.

The Witness: But what I mean by pressure, it

(Testimony of Gerald A. Hatfield.)

didn't require any telephone calls or any visits to go out and see why he didn't pay.

The Court: Well, in any event the record speaks for itself.

Mr. Bronson: Very well. I have those letters, those are the 1950, the late 1950 and 1951 dun letters.

(Showing papers to Mr. Garrison.)

Mr. Bronson: May I read them in the record?

Mr. Garrison: Sure.

Mr. Bronson: I will offer another group of letters that have to do with the 1951, excepting the top one, which is December 28, 1950, which are of that character, if the Court please, telegrams and letters dealing with the period up to and including March 28, 1951.

The Court: May be marked next in order.

Mr. Bronson: May those be marked?

The Clerk: Defendant's Exhibit F admitted and filed in evidence.

(Whereupon the group of telegrams and letters above referred to were admitted into evidence and marked Defendant's Exhibit F.)

Mr. Bronson: If I may I will simply read the date, whether it is a wire or a letter, and the amount that is [203] covered in the dun.

First in this Exhibit F is December 28, 1950, addressed to Joe Lotz by Mid-States Insurance Company, signed by Hamburg:

"Imperative we receive \$24,778.47 past due Oc-

(Testimony of Gerald A. Hatfield.)

tober account. Also 13110 before the end of the year."

January 23, a letter addressed to Joe Lotz, signed Mid-States, a dun for \$18,754. November balance past due. I will read it:

"Under date of January 10, we called your attention to the past due November balance of \$18,754.64. We surely expected that this account would be paid by now. However, we can't find a record of your paying it. Your next month account is practically due as well.

"Won't you please send us this past due account by return mail, and if you prefer, include the payment for the next month in your check."

The next is a letter of January 26, 1951, referring to the same account of \$18,754.00 past due and with the closing:

"Remit today." [204]

Now next is March 13, 1951, a letter to and from the same parties demanding the past due payment of \$22,467.

The next is a letter, March 22, same parties, addressee and sender, under date of March 13, "Under date of March 13 we called your attention to the past due balance of \$22,467.93. Fully expected you would have paid it by now.

The next is an ending with a request for immediate payment.

Next is March 28, 1951, a telegram:

"Have not received payment of January past due account in the amount of \$22,467. Remit today."

(Testimony of Gerald A. Hatfield.)

Q. Now, in further reference to that matter, Mr. Hatfield, I want to call your attention to the transcript of the trial in the bank case, page 75, beginning at line 6 at which the following occurred:

“Question. (By Mr. McCallum): Very well. I show you then a telegram dated June 1 and ask you if that to your knowledge was sent by an officer or representative of your company to Mr. Lotz?

“Mr. Garrison: We will stipulate it was.

“Mr. McCallum: Thank you. May I read this, then, if Your Honor please?

“The Court: Yes.

“Mr. McCallum: Addressed to Joe Lotz, dated June 1, 1951.

‘Have Not Received Payment Of March Past Due [205] Account In The Amount Of \$18,061.65 Remit Today.

Charles F. Hamburg, Jr., Mid-States Insurance Co.’”

Now, here is a letter dated June 6, 1951—I will show it to your counsel—and ask you to identify them.

Q. Is this a photostat of a letter written to yourself, Gerry Hatfield, by Ray E. Titus, President of your Company on June 6th?

Mr. Garrison: We will stipulate that it is.

A. Yes.

Mr. Bronson: Ask that be admitted, your Honor.

The Court: Be admitted.

Mr. Garrison: No objection.

(Testimony of Gerald A. Hatfield.)

The Clerk: Defendant's Exhibit G admitted and filed in evidence.

(Whereupon the letter above referred to was admitted into evidence and marked Defendant's Exhibit G.)

Mr. Garrison: Might not that be read?

Mr. Bronson: Yes, I propose to read it, counsel. June 6, 1951, on the inter-company correspondence heading of General Finance Corporation.

"I believe I already told you Kledzik should be responsible for lining up agents in the Los Angeles area, and I do not think you want to expand your activities with Joe Lotz.

"Again, I must say if we can't get better representation [206] in California than Joe Lotz, we will never stay out of trouble.

"I never should have permitted this situation to go along as long as it has."

The Court: What is the date of that?

Mr. Bronson: That is June 5 of 1951.

The Witness: I would like to explain what was behind that letter, if I may.

Mr. Bronson: I would suggest that that go for the cross examination. It is really not testimony of the witness, in view of the stipulation. It should be saved for the redirect.

Mr. Garrison: I think he is right.

Mr. Bronson: Q. Now again referring to the testimony that you gave in the trial, and from the same transcript at page 30—I am reading beginning line 8 and concluding on line 22 of that page.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison's examination of yourself, Mr. Hatfield.

"Question: Mr. Hatfield yesterday testified to an amount of money that Mr. Lotz was indebted to Mid-States, I believe in August 1951, and you told me after the Court recessed that you were in error with respect to the amount you stated. Would you like to correct your testimony in that regard?"

"Answer: Yes, sir, I would like to correct it.

"Question: Will you tell us first what you testified to yesterday and what the correct figure should be?"

"Answer: As I remember yesterday I stated that the amount Mr. Lotz owed Mid-States Insurance Company as of August, 1951, was twenty to twenty-five thousand dollars.

"Question: What is the fact?"

"Answer: The true fact is, after checking my records, he actually owed Mid-States \$62,000 at that time."

And again referring to your testimony in the same record from page 79, and if I may, I will read a couple of pages of this because it is necessary to get the significance. I am starting at line 19 on page 79—going to read from line 15:

"Question: That's right. If I showed you a letter on that subject bearing the date of about January 25, 1951, would that refresh your recollection as to when you had that knowledge?"

"Answer: Yes, this is the account I had in mind; yes, sir.

(Testimony of Gerald A. Hatfield.)

“Question: And is it true then you knew in January of '51 that he”— that is, referring to Mr. Lotz—[208] was paying as high as 30 per cent to his sub-agents?

“Answer: Yes, sir.

“Question: Now, in addition to the payments of commissions to his sub-agents what other expenses did Mr. Lotz have?

“Answer: Mr. Lotz had all the expenses of running his office.

“Question: You mean, to pay his payroll, his rent, his telephone, all expenses of running a business, is that correct?

“Answer: That's right.

“Question: So then he had that plus 30 per cent of the dollar taken out, didn't he?

“Answer: Yes, sir.

“Question: Any other expenses?

“Answer: Claim adjustment expense, yes.

“Question: All right. Now, what was his loss ratio running in 1951?”

I will interrupt there to say that claims adjustment refers generally to the subject of loss ratio, does it not?

A. Yes, sir. Claims adjustment to loss ratio.

Q. Yes. A. No, I beg your pardon.

Q. Claims adjustment is the cost of adjusting?

A. That's right, but that is a separate figure, not figured [209] in the loss ratio.

Q. Then what you pay out, loss ratio, that is to

(Testimony of Gerald A. Hatfield.)

the policy holder for a bent fender, stolen car, whatever it may be; right?

A. That's right.

Q. And when he said another expenses, and the answer "Claim adjustment expense," that would be in addition to the commission he paid to get the business, the cost of running his office, and then the question follows:

"Question: All right. Now, what was his loss ratio running in 1951? "Answer: 1951?

"Question: Yes.

"Answer: It varied from 50 per cent to 75, 76 per cent.

"Question: Then, Mr. Hatfield, if Mr.—this is the 1951 loss ratio you just gave us the figure on?

"Answer: Yes, sir.

"Question: If in 1951 he was paying commissions to sub-agents of 30 per cent, he had his office expense in an amount which I presume you don't know, is that correct?

"Answer: That's correct.

"Question: Do you know that he had approximately 35 to 40 employees?

"Answer: I never knew he had anywhere near that many employees at that time. [210]

"Question: How many do you think he had?

"Answer: The most I ever saw in his office would not exceed 15.

"Question: I see. And his loss ratio was running, you said, from 50 to 75 per cent?

"Answer: Yes, sir.

(Testimony of Gerald A. Hatfield.)

“Question: How could he operate, Mr. Hatfield, under those circumstances?

“Answer: Well, he could—remember this, he had, he was representing other insurance companies and he could operate on the earnings of the other insurance companies as well as what he was earning from us.

“Question: He couldn’t operate on your company’s earnings, could he?

“Answer: Not on those figures, no, sir.”

Turning to another subject—before I do that, do you have those totaled?

(Colloquy between counsel; inaudible to the reporter.)

Mr. Bronson: I should, perhaps, take this up with counsel, your Honor, before reading in the record.

I would like to read into the record—it may be subject to correction by Mr. Garrison, the results of the computation of the total business, January to August inclusive, 1951, gross premiums of the two companies, and in the case of Mid-States, using the amounts where there [211] was a minus figure, the Mid-States for January to August, inclusive, of gross premiums and giving effect to those deductions, is \$107,240. For the same period for Mid-States it is \$340,425, a ratio of about three to one.

Mr. Garrison: Sorry, I think you said Mid-States and I think you meant—

Mr. Bronson: American Fidelity. Thanks for the correction. In the case of Mid-States the aver-

(Testimony of Gerald A. Hatfield.)

age figure per month for that period, taking into account the negative figures, is \$13,400 of average gross premiums per month, and at an annual rate of \$160,000.

Q. Those months that showed negative amounts, those were due to cancellations, were they not?

A. The negative amounts were produced by cancellation, yes.

Q. Yes. Were you present at a meeting in Chicago when Mr. Lotz was there and Mr. Titus was also there?

A. At what time?

Q. In May of 1951?

A. Yes.

Q. You recall discussing with Joe Lotz the condition of his business in May, 1951, on the occasion he was back there?

A. No, sir.

Q. Did you invite him to come back there? [212]

A. No, sir.

Q. Or did he come on his own?

A. He came on his own.

Q. In view of an answer you gave yesterday—when I say “you” in a case of that kind, I meant to include anybody in your Company. To your knowledge was he asked to come back by anyone connected with your Company?

A. No, sir.

Q. Do you recall Mr. Titus saying to Joe Lotz in that meeting in the presence of yourself, “You are in trouble, Joe, but we are going to help you,” or words to that effect?

A. No, I do not recall it.

Q. Mr. Hatfield, you testified yesterday on di-

(Testimony of Gerald A. Hatfield.)

rect examination, or on the day before, that the retention of the Company out of Joe Lotz premiums, went through a course whereby at the start the Company took out 20 per cent as its retention; the Company's retention was thereafter reduced during the period thereafter and up to September 1, 1951, to 17 and a half per cent, then to 15 per cent, and then to 14 per cent, the latter under the arrangements you made with him in May and in September, 1951? A. That's correct.

Q. You did that because you were aware he wasn't making any money on the 20 per cent retention and later on the 17 and a half per cent retention? [213]

A. No, that isn't true. The records show different than that. I can show you the figures of his earnings.

Q. You don't suggest——

Mr. Garrison: Let him finish his answer.

Mr. Bronson: All right.

A. (Continuing): I can show you figures of his earnings throughout the years '47, '48, 9, '50 and '51, and they show he was earning good money, and all that time the loss ratio you introduced into the testimony yesterday showed he was earning good money in the years 1948, 1949, 1950.

Q. And when you reduced the Company's retention in the year 1951 to 14 per cent and swore Joe to secrecy on the thing, you did that because he needed 86 per cent instead of 85 per cent to keep his head above water, didn't you?

(Testimony of Gerald A. Hatfield.)

A. No, I did that in order to meet the competition. I couldn't meet the competition of giving him a guaranteed commission, as American Plan did, so I had to reduce my retention to make it more attractive to him, that is all.

Q. Mr. Hatfield, one of the things you said in that letter that was read yesterday was that—two or three places,—he wasn't to tell anybody about it so that the competition wouldn't know about it.

A. That's right.

Q. You weren't meeting competition then, were you?

A. I certainly was. I explained in that letter I didn't [214] want to start a retention war among the retrospective companies.

Q. I want to go back to this question about your knowledge of this situation. Now, you testified you had certain men calling on Joe Lotz all during the period once a month?

A. Approximately.

Q. I beg your pardon?

A. Approximately once a month.

Q. All right. One of them was named Kledzik, wasn't it?

A. That's correct.

Q. Another one named Oldberg?

A. That is correct.

Q. Those men were field supervisors, were they not, over a given territory?

A. To a certain extent, yes.

Q. Yes. Were they officers of the Company, either one of them?

A. Mr. Oldberg was an officer of the Company.

(Testimony of Gerald A. Hatfield.)

Q. Did he supersede Mr. Kledzik?

A. Yes.

Q. When did he supersede Kledzik, approximately; give us the best estimate you can when it was.

A. I would say approximately May of 1951.

Q. And what was his position in the Company, what title did he have; what title or titles did he have?

A. He had the title of resident vice-president, I believe [215] it was.

Q. You're vice-president too, aren't you?

A. Yes, sir.

Q. And did Mr. Kledzik have a title?

A. Resident secretary, I think.

Q. Both officers of the Company, then?

A. That's right.

Q. And one of them for one period and the other for the other were up here approximately once a month?

A. That's right.

Q. Right?

A. That's correct. And during the period from October 1950, when you assumed the position that you presently have, one of your duties was supervision of the agencies, wasn't it?

A. That's correct.

Q. And you worked in close collaboration with the field men, such as the two we named?

A. That's right.

Q. Now when you sent these dunning letters out

(Testimony of Gerald A. Hatfield.)

all during 1950 and 1951, weren't you sending copies of them to those men out in Los Angeles?

A. I don't think we did.

Q. You what?

A. I don't think we did send copies. [216]

Q. What is the state of your knowledge, that you don't know?

A. Well, I will have to say I don't know; I am not positive.

Q. All right. Now, if you're having trouble, let us take the letter that I read, June 6, 1951, from Mr. Titus, the brief letter here, that would be a thing that the field agent would know about, wouldn't he, right away? A. No——

Mr. Garrison: Pardon me. If the Court please, counsel objected to the witness referring to or explaining what the "trouble"—what the use of *that* term meant in that letter. Now, counsel is cross examining him on the use of the term "trouble" and I object to the question on that ground unless it is made more definite. The witness can explain what the letter meant when it said "trouble", it is presuming a broad use of the term "trouble" is intended when in fact it was not.

The Court: You may develop the facts.

Mr. Bronson: Counsel is testifying that there is a restricted meaning to the word and that I want to go out, the testimony of the counsel that it didn't mean that. He doesn't know anything about it, I take it, because this litigation wasn't even in the picture then. I mean, Mr. Garrison can't say that.

(Testimony of Gerald A. Hatfield.)

It is this interference with my questioning of this witness [217] that I object to, Judge.

Mr. Garrison: I don't want to be persistent in this matter, but it seems to me that when he objects to the witness explaining what was meant in the use of the term "trouble" in a letter, that it is unfair to the witness and not enlightening to this Court to thereafter refer to "trouble" in its broadest sense.

The Court: Well, trouble in its broadest sense means nothing to me. Trouble is so wide in scope.

Mr. Garrison: That is my point.

The Court: You have to nail it down to spell out something. Let's proceed.

Mr. Bronson: To come right between these dunning letters there is a perfectly good interpretation of it available for the Court.

Q. Now, then, did you have any correspondence, your office in Chicago, with Kledzik and Oldberg with regard to the estate of the account of Jot Lotz during the year 1951?

A. With regard to the estate of the account? The state of the account?

Q. How far behind he was.

A. I don't recall any, no, sir.

Q. Did you have any correspondence with him about the subject of the kind of business he was writing, standard or substandard during that period in 1951? [218]

A. I believe we did.

Mr. Bronson: We made a demand for correspondence of that kind, and we found none.

(Testimony of Gerald A. Hatfield.)

Q. Do you know where this correspondence that you had about substandard writing by Joe Lotz may be found today?

A. No, sir, we showed you everything we had.

Q. But you know of something that was not among the documents you sent us, then, on that subject, is that what you are saying?

A. No, I am not saying that. I said I believe we had some correspondence. I could be wrong.

Q. You made available to Mr. Weingarten of our firm three letter files representing correspondence from 1947 on through 1951 with Joe Lotz?

A. Yes, sir.

Q. Do you represent that that is all the correspondence you had with that agent?

A. I do.

Q. Well, getting back to these gentlemen Kledzik and Oldberg, did they, during the course of the correspondence that you were having with, communications of any kind with Mr. Lotz about substandard business, did they investigate those things on their visits, monthly, to his office?

A. About the substandard business, you mean?

Q. Yes. [219]

A. That was their prime duty, was to guide him in underwriting and settlement of claims.

Q. Now, you were good enough to state yesterday that substandard business may be very profitable, and that it may be very unprofitable, depending upon the rate that is charged?

A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. Yes. Well, did I understand that you were complaining to these gentlemen about the substandard business he was writing at any time during 1951 and having them look into it?

A. In August of 1951.

Q. Is that the first time?

Mr. Garrison: Just a moment, let Mr. Hatfield finish his answer.

Mr. Bronson: How can you tell he wasn't finished?

Mr. Garrison: Because his mouth was open as if about to speak.

Mr. Bronson: That is a good one.

Mr. Garrison: If you would give him half a second I think he can finish it.

The Court: Let us have the reporter read the question and the answer.

(Record read.)

Mr. Bronson: Counsel is intuitive. [220]

The Witness: (Continuing) Well, in August of 1951 wasn't the finish of my answer.

The Court: Well, finish it.

The Witness: All right. I would like to start over again. May I?

The Court: Sure, start over.

The Witness: You asked me if I were complaining to them about the substandard business at any time during 1951. We always watched the substandard business regardless of whether we have one rate chart which includes it or two rate charts, one

(Testimony of Gerald A. Hatfield.)

for substandard and one for standard, we always watch it, the amount of substandard business.

Now, what I started to say was in August of 1951 we introduced a new rate chart in the State of California, and this new rate chart was a single rate chart. In other words, we eliminated completely our previous substandard rate chart, and under the new rate chart we had to be doubly close in watching the amount of the substandard, those rates were not high enough to stand a great percentage of it.

Mr. Bronson: That concludes your answer, sir?

A. Yes, sir.

The Court: So I may follow this testimony, then you at all times had full knowledge of all of the transactions that went on between the parties? [221]

The Witness: You mean between the field men and Mr. Lotz?

The Court: Yes.

The Witness: I wouldn't say I had full knowledge; I had general knowledge.

The Court: They were your agents, that was their duty, was it not?

The Witness: That was their duty, yes, sir.

The Court: Proceed.

Mr. Bronson: Q. You gave them general instructions, did you not? For instance, Mr. Kledzik, when he went to work, and Mr. Oldberg, they had instructions about what they were to do?

A. Yes, sir.

Q. In connection with checking up on agents

(Testimony of Gerald A. Hatfield.)

such as Mr. Lotz, and those instructions included examination, or at least taking checks on the type of business he was writing?

A. That's right.

Q. Such as standard or substandard, the rates paid out for the acquisition of that business?

A. No, sir, we never asked them to check that.

Q. Mr. Hatfield, you don't mean that, do you?

A. Certainly.

Q. You mean your instructions didn't include that when you gave instructions to these field men to check how much he was [222] paying to get the business?

A. I don't recall ever giving Mr. Kledzik or Mr. Oldberg instructions to find out what rates of commission any of the sub-agents were paying.

Q. Do you know where any of the correspondence is between either Kledzik or Oldberg and your office about what they found as to their examination of Lotz' business? Where is that correspondence during the period that our order asked for?

A. Whatever correspondence there was in the group Mr. Weingarten saw.

Q. There was none and I assume you knew that. There is no correspondence between your office and your field agents about what you told them to do, what they did and what they reported back to you. There is a complete absence of that, and you, I assume, know that, you put the documents down in front of them and in your director's room in your plant in Chicago, you recall that?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

Q. And you remember, don't you, that you read what was in there before you handed it to him, the attorney from our office? A. Yes, sir.

Q. Now, you know, and can you tell this Court today that there was not a single scrap of correspondence during the period [223] that the order of this Court called for from 1947 up to and through 1951, of correspondence between you and your field agents about the condition of Joe Lotz' going in any direction; you know that, don't you?

A. If it was not there I will have to say I know.

Q. There was plenty of correspondence, too, don't you know?

A. I don't know there was plenty.

Q. You know when we went over to the warehouse where Joe Lotz' records were kept, those records being in your possession, that there was the same absence of any correspondence between your office in Chicago and Joe Lotz' office?

A. Yes, sir, I found that out when I went with them.

Q. Can you tell this Court where—strike that.

I am asking you to keep in mind that there was the imminence of a lawsuit from early in December, 1951, when you were taking statements from this man Smead back there and Joe Lotz and Mr. Garrison came into the case as an attorney, in view of that, can you tell the Court where that correspondence has gone to, either the correspondence that should have been in Joe Lotz' office between him

(Testimony of Gerald A. Hatfield.)

and you, the correspondence in your home office between you and your field agents?

A. I do not know where it went to. I simply know we did nothing to conceal it nor to destroy it.

Q. You're speaking for whom, now? [224]

A. I am speaking for Mid-States Insurance Company.

Q. Coming down to those statements that were put in by Mr. Garrison yesterday and read to the Court, I mean the statements of June 6th that was signed by Mr. Smead and endorsed by Mr. Lotz and the others that followed that, you met Mr. Mead——

Mr. Garrison: Pardon me, I think you said June 6th.

Mr. Bronson: I mean December 6th. Thank you for the correction.

Q. (Continuing) You met Mr. Mead, the Oakland attorney—he is to be distinguished from Mr. Smead, who is the employee of Mr. Lotz,—but you met him at that time, did you not?

A. Yes, sir.

Q. And weren't you in his office the morning or afternoon of the day the first statement was taken on December 6th?

A. I don't recall the exact time; we were in his office on December 6th, yes.

Q. And you asked if you could take a statement of Joe Lotz, didn't you, and asked Mr. Mead if he could do it?

A. If I could take a statement from Mr. Lotz?

(Testimony of Gerald A. Hatfield.)

Q. Yes, either that day or the day before?

A. I don't recall asking Mr. Mead anything about it.

Q. Don't you remember that Mr. Mead made an appointment and called up Mr. Lotz from his office on the day that you were in his, Mr. Mead's office, and made an appointment for [225] ten o'clock on December 6th, the day that the statements were signed?

A. No, sir, I don't recall that.

Q. You just have no recollection of it?

A. No, I don't. The only time I recall being in Mr. Mead's office on December 6th was the night of December 6th.

Q. Is that the night that you were over at Lotz' office and that Mr. Smead was writing out a statement?

A. No, that was December 5.

Q. That was December 5. You don't remember being up in Mr. Mead's office earlier in the day, December 5, and asking to take the statement of his client Lotz?

A. No, I don't remember that, sir.

Q. And you don't remember that at that time in your presence he phoned Lotz and made an appointment for ten o'clock the following morning at his office?

A. No, sir, I don't remember that.

Q. Don't you remember when you came up to Mead's office with the statements that had been signed, or that were there for—that were brought up that had been prepared the night before, and

(Testimony of Gerald A. Hatfield.)

Mr. Mead reproached you for going ahead and having prepared a statement of his client, taking a statement from his client after having made an appointment to meet in his office?

A. In the first place I didn't take a statement from Mr. Lotz. [226] The statement I took was from Mr. Smead.

Q. Didn't Lotz sign it?

A. He signed it that night, yes, sir.

Q. What night?

A. The night of December 6th, I believe, and Mr. Mead was there and instructed him to sign it.

Q. You remember you or Mr. Titus, somebody offering statements to Mr. Mead to read and he refused to do so and again reproached you for the method in which you had taken them and not appearing by appointment?

A. I do not remember Mr. Mead ever reproaching me on anything. In fact, I am sure I can say he did not reproach me.

Q. I will conclude now, just a question or two.

Mr. McKinnon has corrected me on an error I made and I want to ask you that now. I referred you to a meeting in May in Chicago at which Mr. Lotz was present.

A. Yes.

Q. That was an error. I intended to designate the meeting on August 15 after Joe Lotz had been to New York, and came, stopped at your place on the way out.

A. Well, the August 15 meeting is what I had in mind.

(Testimony of Gerald A. Hatfield.)

Q. And you recall Mr. Titus saying to Mr. Lotz in your presence, "Joe, you are in trouble, and we are going to help you"?

A. I don't believe Mr. Titus made that statement; I don't [227] recall it at all.

Q. By the way, on the subject of this missing correspondence called for by our order, did you microfilm any of those records of Joe Lotz?

A. We microfilmed the agent's ledger sheets.

Q. What else did you microfilm?

A. To the best of my knowledge that was all we had microfilmed.

Q. Who else knows about it? Who ordered it?

A. Mr. Titus would know about that, then.

Q. Who ordered the work done?

A. Mr. Titus.

Q. Who did it?

A. It was done in Oakland; I don't know who did it.

Q. You don't know the name of the firm?

A. No, I don't.

Q. Were you out here at the time it was ordered? A. No.

Q. And it is your recollection that only the ledger sheets were microfilmed?

A. That is my recollection, yes, sir.

Q. By the way, who kept the firm ledger sheets that you microfilmed?

A. I think they were turned back to Mr. Lotz.

Q. Well, they are not missing, in other words?

A. No, they are not missing, so far as I know.

(Testimony of Gerald A. Hatfield.)

Q. I am not going to call your attention to all of this stuff, but I have many copies of a letter here. To identify it I will give the date and the opening part of it. It is a letter that Joe Lotz signed and is witnessed by Mr. Mead and Ralph Smead, and it is dated November 27, 1951, addressed to you.

Now, on November 27, 1951, you were in Oakland, were you not? A. That's correct.

Q. The letter starts in this way, and that will identify it, I think, for your Honor.

"Dear Mr. Hatfield:

"I wish at this time of my own free will and accord to relate to you the facts and circumstances surrounding the financial difficulties in which I find myself today and to explain to you in detail to the best of my knowledge how it happened."

Who dictated that letter?

A. I don't know who dictated it. It was written in Mr. Mead's office and I wasn't there at the time it was written.

Q. Who was there?

A. Well, as far as I know only Mr. Mead, Mr. Lotz, and Mr. Smead. I don't know, none of our representatives were there when it was written.

Q. You don't know who was there, then?

A. No.

Q. You don't know who dictated it?

A. No, I don't.

Q. Who else was here from the Mid-States at this time?

A. Mr. Czar, Mr. Oldberg, Mr. Kledzik.

(Testimony of Gerald A. Hatfield.)

Q. Is Mr. Czar a general counsel for your company? A. Yes, sir.

Q. And he is a house attorney, if I can use that term—does he have a private practice, or practice within?

A. No, he is just a house attorney, that's right.

The Court: What do you mean by a "house" attorney?

The Witness: I mean, he has no private practice.

The Court: Devotes his time exclusively to this insurance?

The Witness: To our organization.

The Court: I see. All right.

Mr. Bronson: That is all at this time, your Honor.

Mr. Kakures: Your Honor, I have a few questions at this time.

Cross Examination

Mr. Kakures: Q. Mr. Hatfield, when did the name Joe Lotz first come to your office or into your capacity as an officer of the Mid-States Insurance Company? [230]

A. You mean the exact date?

Q. No, not the exact date, but just give me the year, if you can remember that, when the name first——

A. Well, I first heard about him in 1947.

Q. I see. Was that through Mr. Donnelly, was it?

A. Through Mr. Donnelly and through Mr. Cass.

(Testimony of Gerald A. Hatfield.)

Q. I see. Did you and Mr. Donnelly ever discuss Mr. Joe Lotz? A. No, sir.

Q. During the year 1947 did you discuss Joe Lotz' insurance agency with anybody of Mid-States? A. Mr. Cass.

Q. And was there any discussion as to the ability or knowledge of Joe Lotz in the field of insurance underwriting?

A. Well, there might have been; I can't state definitely no, definitely yes.

Q. What is your personal opinion of Joe Lotz' insurance underwriting ability?

A. At the present time?

Q. Yes, sir.

A. I think he is very capable. He has shown that through his past experience with us through three and a half years, made good money off of it.

Q. Is there any doubt in your mind as to Mr. Lotz' honesty and integrity? [231]

A. Absolutely none.

Q. When was the first time you met Joe Lotz in Oakland, Mr. Hatfield?

A. I think it was July of 1950, first part of July 1950.

Q. And what was the scope or the purpose of the visit?

A. Oh, I was just making a good will visit, never called on the agents in California and this was my first trip to California.

Q. I see. At that time did you discuss any of

(Testimony of Gerald A. Hatfield.)

the workings or operations of the Joe Lotz Insurance Agency either with Mr. Lotz or Mr. Smead?

A. No, sir.

Q. Did you at that time have any purpose at that time to discuss the authority of Joe Lotz using—Joe Lotz having the authority to endorse checks made payable to Mid-States?

A. I had no purpose or no reason.

Q. Did Joe bring that up to you?

A. No, sir, that question has never been brought up by Joe.

Q. Have you and Mr. Lotz ever spent any time together socially? A. Sir?

Q. Have you spent any time at all with Mr. Joe Lotz, socially, dinner or spending the night out?

A. Certainly.

Q. At that time have you ever discussed business off the cuff with Joe Lotz?

A. No, sir, when we go out to play we play real good.

Q. Did you know when you first made your trip here, was it 1950, Mr. Hatfield?

A. Yes, sir.

Q. Was that the early part of the year?

A. No, that was July.

Q. July. Of course, you had knowledge at that time that he was writing for other insurance companies, is that correct?

A. I wouldn't say I had knowledge, but I certainly suspected it. I knew he wrote other types of business that we didn't write.

(Testimony of Gerald A. Hatfield.)

Q. I see. Did you know that—anything about his trustee account at that time, how he operated, how Joe operated, Joe Lotz operated in making payments to the various insurance companies, including yours?

A. No, sir, I did not; I had no reason to inquire.

Q. Did Joe Lotz ever tell you that he put some of his own money in the trustee account to make premiums, in order to meet premium payments to your Company or any other company?

A. Not to my knowledge. [233]

Q. Did he ever tell you he put in an inheritance of \$750?

A. I don't recall that, no, sir.

Q. Or had to borrow on his life insurance in order to make payments?

A. I don't remember him telling me that, no.

Q. Mr. Hatfield, can I make this question of you? What is the custom of the trade, or if I may call it that, when an agent is working insurance for one or more, say two or more insurance organizations, are they allowed to commingle their funds, or how is that worked out?

A. When you say are they allowed to commingle their funds, I don't know. I think that is up to the companies. You mean whereby they give him permission to commingle funds, if they so desire. I remember in one conversation with Joe I told him not to comingle his funds.

Q. What did Joe say to that? A. Sir?

Q. What did Joe say in answer to that?

(Testimony of Gerald A. Hatfield.)

A. He said he wasn't.

Q. Now, you say—is that a general practice or is it not a general practice?

A. I would hate to answer that. I don't know whether it is a general practice or not.

Q. You have no idea? [234]

A. By general practice, what do you mean?

Q. Of any insurance agent, not Joe Lotz in particular, but any general agent, insurance agent, handling insurance for two or more organizations do you know of your own knowledge, from your experience in the insurance field, whether there is a comingling of trust funds?

A. I don't think it is a common practice, no.

Q. Do insurance companies frown on that type of practice if brought to their knowledge?

A. No, I wouldn't say we would frown upon it.

Q. In other words, as long as they got their payments they didn't particularly care how the general agent operated, is that correct?

A. That's correct.

Q. Now, in 1951, Mr. Hatfield, approximately how many trips did you make to Oakland?

A. In 1951?

Q. Yes, sir.

A. Only two, I believe.

Q. I see. And the first trip was made when?

A. I think the first part of May or the latter part of April.

(Testimony of Gerald A. Hatfield.)

Q. What was the purpose of that particular trip?

A. Just a routine trip. I usually try to call on the agents twice a year, and this was just a routine trip, time to come out and see Joe again.

Q. You called on Joe Lotz, of course, and did you spend a number of days with Joe Lotz, or was it just a passing visit?

A. I think I spent three or four days.

Q. Did you discuss any of Joe Lotz' insurance operations at that time?

A. Just in generalities.

Q. I see. At that time did Joe ever bring up the fact that he wished he had the authority to endorse Mid-States checks made payable to Mid-States? [236]

A. No, sir, he did not. It was at that time that we discussed the May first amendment to his contract.

Q. What did he say about that?

A. Well, he said he needed a longer credit period.

Q. What did you say, Mr. Hatfield?

A. I asked him why. He said, well, his brokers, his agents were taking too long to pay him and he couldn't meet our twenty-five day limit.

Q. Did you ever tell him perhaps it would be wise for him, for Joe to lower the commissions paid to his sub-agents? Did you pass any general sug-

(Testimony of Gerald A. Hatfield.)

gestion to him of any kind in order to lower his overhead?

A. I think I might have, although I am not certain on it.

Q. And then the next time you came out to Oakland in the year 1951, was that around the month of November or December?

A. The latter part of November.

Q. And that was a special trip to see Joe Lotz' agency, was that correct?

A. That was a special trip, yes, sir.

Q. That was when things got a little rough, is that right?

A. That's right.

Q. And when did you first meet Joe on that second trip in 1951?

A. Well, let's see, we arrived here the morning of the 24th. I think we met Joe that afternoon, the afternoon of the 24th. [237]

Q. Did you consult with him at his agency or where?

A. In the Leamington Hotel.

Q. I see. And what was the topic of business there?

A. What his trouble was, his finances.

Q. Did Joe have any excuses or any suggestions to offer to you at that time, Mr. Hatfield?

A. You mean excuses for what?

Q. For the fact of his lagging behind, or the fact that he was slow in payment to your company, or just insurance business being slow period?

(Testimony of Gerald A. Hatfield.)

A. Yes, his prime excuse was that he had been too lax in his supervision of his own business, left too much up to another party, and things had gotten away from him.

Q. Did he tell you at that time he thought he could come out of it, isn't that right?

A. Yes, he did.

Q. What did you say, you would help him along?

A. At that time we thought we might and said we would try to help him, yes, sir.

Q. I see. This was some time early in December in 1951?

A. Latter part of November and very first part of December.

Q. And then a few days later, as you testified to, I believe it was either yesterday or the day before, Joe Lotz and you drove to San Francisco, is that correct?

A. That's right. [238]

Q. And on the way over there you said you stopped at a drive-in and had some lunch, is that correct?

A. That's right.

Q. And your particular trip that afternoon was to see the Insurance Commissioner in San Francisco?

A. That's right. Not the Commissioner, no, sir; to see the Rate Deputy.

Q. What was the purpose of that visit, Mr. Hatfield?

A. Well, we had been having a difference with

(Testimony of Gerald A. Hatfield.)

the insurance department for quite some time on our rate situation out here.

Q. You were interested in getting a high rate structure, is that correct?

A. Yes.

Q. And were you successful in that attempt?

A. No, I wasn't successful.

Q. I see. When did the Mid-States Insurance Company enter into the insurance business in California, Mr. Hatfield?

A. I believe approximately 1944.

Q. I see. And how did that insurance venture in California work out for Mid-States?

A. Well, parts of it worked out well and parts of it not so well.

Q. Isn't it true that shortly after you revoked Mr. Joe Lotz' agency that Mid-States Insurance Company withdrew from the insurance business in California? [239]

A. We ceased taking new business in the State of California.

Q. That was shortly after you revoked——

A. That is right.

Q. ——Mr. Lotz' agency, is that correct?

A. However, we have not withdrawn our certificate of authority, and our certificate of authority with the State is still in effect.

Q. As I understand it from the record the rate structure that you were interested in was later

(Testimony of Gerald A. Hatfield.)

granted by the Insurance Commission, is that correct? A. No, sir.

Q. It was not granted?

A. No, sir, I didn't have anything more to do with the insurance department after that meeting of November 24, but it wasn't granted at that time. We were still at a misunderstanding.

Q. When did you and the other officials of Mid-States Insurance Company contemplate, if I may say that, withdrawing from writing any further business in California, did that start in the early part of '51, or did you never discuss that?

A. Oh, yes, we discussed—we didn't discuss it at all, or didn't even have it in our minds until this mess at Lotz office came about.

Q. Well, would you say that your California trouble was due mainly to Joe Lotz' agency, is that correct?

A. What do you mean, "California trouble"?

Q. I mean the fact that your California—I mean, am I right in this observation, that your entrance into the insurance business in California didn't prove so profitable to Mid-States Insurance Company, or is that a mis-statement?

A. That is a mis-statement.

Q. Is it?

A. Except for the money we have lost on this Lotz deal, our other ventures in California were largely profitable.

Q. If it wasn't for the Lotz deal, you would still be doing business in California?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

Q. Coming back to December, I believe it is December 6, Mr. Hatfield, that was a couple of days after you made that trip to San Francisco, I believe, did you have occasion to see Mr. Smead or Mr. Lotz in relation to having them make out some statements in relation to their activity?

A. On December 6?

Q. Yes, sir, December 5 or December 6.

A. That's right.

Q. And when did you first approach them on that particular—

A. The morning of December 6.

Q. I see. And what was—what did you tell them?

A. I just told them I talked to Chicago the night before and I had received instructions to ask them to write out a statement on what they had told me previously. [241]

Q. First what did Mr. Lotz say to this?

A. Mr. Lotz didn't want to do it.

Q. Did he tell you why?

A. He was scared. He said, "I am scared to death of the people in New York. I don't know what to do."

Q. What did Mr. Smead tell you?

A. Mr. Smead readily agreed to write out a statement.

Q. Did you tell Mr. Smead or Mr. Lotz that you yourself needed the statements for your own pro-

(Testimony of Gerald A. Hatfield.)

tection and that you wouldn't use it against either Joe Lotz or Ralph Smead?

A. For my own protection?

Q. Yes. A. Absolutely not.

Q. Did Mr. Smead cooperate then with what you asked him to do? A. Did Mr. Smead——?

Q. Cooperate with you in writing out the statement?

A. He cooperated to my request to write it out, yes.

Q. The statements contained in Plaintiff's Exhibit 11, did he recall those of his own memory or recollection, or did you aid him in any respect as to events, chronological order of events?

A. He recall it all or what?

Q. Did you dictate any part of that statement to Mr. Smead?

A. There isn't one word of mine in that statement.

Q. How long did Smead take to prepare that statement? [242]

A. It took him a period of about five or six hours.

Q. Where were you, Mr.——

A. I was on the second floor.

Q. Mr. Smead was where?

A. On the first floor.

Q. And how did you pass your time for those five or six hours? A. Working like a dog.

Q. And did you ever stop in to see how Smead was getting along?

(Testimony of Gerald A. Hatfield.)

A. Oh, occasionally walked past his desk, say, "How you coming," something like that.

Q. Did Smead ever come over and ask you or ask for any information or suggestion of what he should put in his statement?

A. No, he knew what to put in it; he already told me the story.

Q. Did you have occasion in the writing of that statement for you and Ralph Smead to go out and have a couple of beers?

A. I don't recall; we might have.

Q. And approximately when was that statement finished?

A. I think about one o'clock in the morning.

Q. And was Joe Lotz there at all during that interval between that period of time?

A. I can't say that. He might have dropped in on the first [243] floor and I might not have known it.

Q. I see. When that statement was completed you took that statement and you went back to the hotel, is that correct? A. That is correct.

Q. Did you see Joe Lotz the next day?

A. Yes, I did.

Q. And you wanted him to also conform to that statement, at least make a marginal statement on that?

A. That wasn't done until in the presence of his attorney, in his attorney's office.

Q. And did you see Joe Lotz before——

(Testimony of Gerald A. Hatfield.)

A. I asked him the next day if he was going to prepare a statement like I asked him, yes.

Mr. Kakures: That is all.

The Court: Take a recess.

(Short recess.)

Redirect Examination

Mr. Garrison: Q. Mr. Hatfield, Mr. Bronson has interrogated you about the extent of your correspondence between you or others in the Mid-States Insurance Company and Mr. Lotz and Mr. Kledzik or Mr. Oldberg, and he has made the inference that there is a total absence of any such correspondence.

Now, as I understand it, Mr. Weingarten, of the firm of Bronson, Bronson and McKinnon, went to your office in Chicago [244] for the purpose of inspecting documents under the order, is that true?

A. That's true, yes, sir.

Q. Did you make certain files available to him?

A. Yes, sir.

Q. And did he make photostatic copies of some of those? A. Yes, sir, he did.

Q. Do you know approximately how many?

A. I thing in the neighborhood of 60.

Q. And how large were the files that you handed Mr. Weingarten that Mr. Bronson referred to as little files, how large were they?

Mr. Bronson: By the witness as a little file, counsel.

Mr. Garrison: Q. How large were they?

(Testimony of Gerald A. Hatfield.)

A. Those files were about one and a half to two inches thick, each file.

Q. Incidentally, all of these letters that were written Mr. Lotz regarding his account and payments, those were all furnished, were they not, to Mr. Weingarten?

A. Those all came from those files, yes, sir.

Q. I will show you Defendant's Exhibit G from Ray to Mr. Hatfield, and ask you if that was one that was furnished them out of those files?

A. It is.

Q. I will show you Defendant's Exhibit E, being a letter [245] from Jerry to Mr. Kledzik, dated June 7, 1951, and ask you if that was one that was furnished to them out of those files?

A. It is.

Q. I will show you another letter dated July 3, Jerry to Mr. Hamburg, and ask you if that was one that was furnished them out of those files?

Mr. Bronson: What is the exhibit number?

A. It is.

Mr. Garrison: Q. I show you a letter dated November 20 from Mr. Hatfield to Mr. Lotz with copies to Mr. Oldberg, Penfold, and Hamburg, and ask you if that was furnished to them out of those files?

A. Yes, sir.

Q. I show you another letter from Mr. Titus to Mr. Lotz with copies to Hamburg, Penfold, and Oldberg, and ask you if that was furnished to them out of those files?

A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. I show you another letter dated—I guess that is a copy of the previous one.

Show you a letter from Mr. Cass to Mr. Donnelly dated 5-21-47 and ask you if that was furnished to them out of those files?

A. Yes, sir, it was.

Q. Show you a letter dated March 12, Mr. Cass to Mr. Lotz and ask you if that was furnished to them out of those files? [246]

A. It was.

Q. I show you a letter dated May 2, Mr. Cass to Mr. Donnelly and ask you if that was furnished to them out of those files?

A. Yes, sir.

Q. I shan't go through the balance of these, but it is true, is it not, that you did furnish Mr. Weingarten with a substantial number of letters from officers of your company to Mr. Hamburg, Mr. Oldberg, Mr. Lotz and Mr. Donnelly?

A. That's correct.

Q. Now, then, let me ask you another thing: How long was Mr. Oldberg in the California area as an officer of the company supervising agents?

A. Well, he didn't come out here until the middle of 1951.

Q. And for the first period of time he was out here what did he do?

A. He was merely under-study to Mr. Kledzik to learn his activities.

Q. Did you have any occasion during that period to write him at all?

A. No.

Q. Then what was the total number of months

(Testimony of Gerald A. Hatfield.)

he was here before December when this exposure of this condition developed?

A. About four months.

Q. He was here only four months. How long was Mr. Kledzik here? [247]

A. I would say Mr. Kledzik was there about a year and a half.

Q. And during that period was there any particular volume of correspondence between him and the Lotz Agency regarding the Lotz Agency as such?

A. Very little.

Q. Do you deal with your field men as a rule through mimeographed bulletins covering the general problems of insurance underwriting?

Mr. Bronson: We object to this leading examination.

The Court: He may state whether or not.

Mr. Garrison: Q. How do you deal with your agents country-wide with respect to the common problems of running an insurance company?

A. By bulletins.

Q. Were those bulletins made available to Mr. Weingarten in those files? A. Yes, sir.

Q. All right. Did you or anyone else to your knowledge ever destroy a single document that had any materiality to this situation with Mr. Lotz?

A. Absolutely not.

Q. Did you ever hear of anyone destroying any?

A. No, sir.

Q. Did you see the file of correspondence that I

(Testimony of Gerald A. Hatfield.)

furnished [248] Mr. Bronson that they made photostat copies of? A. Yes, sir.

Q. And those letters in that file were letters to Mr. Lotz and others from you and Mr. Titus?

A. That is correct.

Q. All right. Now, in respect to these letters that were written—— A. Here they are.

Q. ——Mr. Lotz in connection with his account, Mr. Bronson asked you if it wasn't a fact and didn't you know as part of your experience in the insurance business that finance companies who placed this insurance always pay their accounts within thirty days, and you answered that question, I believe, did you not? A. I did.

Q. And is it a fact that they always pay their account within thirty days?

A. No, it is not.

Q. Let us just take an example, Mr. Hatfield, of the placing of a piece of business by a finance company, or a used car dealer and trace it up to the time it reaches the insurance company. What is the first thing that happens?

A. Well, the first thing that happens, the dealer who sells the automobile orders their insurance through the sub-agent.

Q. And how long does he have in which to pay his, to pay [249] that premium that he collects from the customer?

A. As a rule he has at least thirty days.

Q. All right. And then to whom does he pay that premium?

(Testimony of Gerald A. Hatfield.)

A. To the sub-agent, the man to whom he gave the order to.

Q. And how long does that sub-agent have within which to pay his premium to his principal?

A. Well, that depends upon his agreement with the general agent, but in most cases at least thirty days.

Q. And who is the sub-agent's principal?

A. The general agent.

Q. And then he pays his money—if we take Mr. Lotz in the particular example—he pays in the second thirty-day period, he is presumed to pay his payment to the general agent, Mr. Lotz?

A. That's correct.

Q. And is it a common practice for those people, like all other businesses, to, on occasion, have delays in their payments? A. Certainly.

Q. All right. Now, how long does the general agent, Mr. Lotz, have within to pay his premium to the insurance company?

A. Well, he had various terms of payment, with us.

Q. As testified here, all the way from twenty-five days to seventy-five days? [250]

A. That is correct.

Q. So that the total elapsed time, if you assume a sixty-day general agency credit period, the total elapsed time between the writing of that business and the time the principal, if it were all paid when due, before that premium reaches the insurance

(Testimony of Gerald A. Hatfield.)

company, is four months approximately, is that true?

Mr. Bronson: What is his answer to that question?

Mr. Garrison: Q. Thirty days——

Mr. Bronson: Wait a minute.

Mr. Garrison: Q. (Continuing) thirty days with the sub-agent, sixty days with the general agent——

A. No, that isn't true, because our agent, Mr. Lotz, under the sixty-day period, the sixty-day period——

Mr. Garrison: Q. Overlaps——

Mr. Bronson: Wait a minute. Wait a minute, let him finish, please.

A. (Continuing) the sixty days also include the term of credit he gives to the sub-agent and the sub-agent gives to the producer.

Q. What would be the total elapsed time, if they all paid when due, by the time the money would ultimately reach the insurance company?

A. Sixty days.

Q. All right. Now,——

The Witness: Can I add something to that?

Q. Certainly.

A. It is possible that it could extend to a period, and still be within the time limit, of almost ninety days, because a policy written—when a policy is written on the first day of September, that is September business reported to us in Mr. Lotz' account, and he has sixty days from the end of September to pay for the policy written on the first day.

(Testimony of Gerald A. Hatfield.)

Q. In that example there would be approximately ninety days? A. That is right.

Q. Is it common in insurance business generally for the agent or the sub-agent to have a credit period within which to pay the company the premiums? A. Oh, sure.

Q. That's standard practice?

A. Standard procedure.

Mr. Bronson: I object to counsel suggesting that is standard practice, let the witness——

Mr. Garrison: Common knowledge.

Mr. Bronson: Permit the witness——

Mr. Garrison: Withdraw the question.

Q. Is it common practice in the particular specialty that you deal in, retrospective insurance, for the general agent to have a credit period?

A. Yes, sir.

Q. And is that necessary because of the very thing that you [252] have explained to the Court, the time elements involved?

A. That's correct.

Q. All right. Now, you said that in your opinion the Lotz' account, during the periods of '47 up to this trouble that arose, was current?

A. Yes, sir.

Q. These letters that have been introduced are letters that are made up, described as form letters, that are sent to all agents?

Mr. Bronson: Well, that is telling him just what to answer, again, Your Honor please. I object again to his suggesting the answer.

(Testimony of Gerald A. Hatfield.)

The Court: I think that counsel isn't fully conscious of the leading and suggestive questions.

Mr. Bronson: It is old practice, Your Honor. I have known him for many years. He knows better.

Mr. Garrison: Q. All right. Just tell us, just characterize those letters, then. I simply wanted to identify the subject that I wanted to ask about. Just tell us what kind of letters those are?

Mr. Bronson: The letters speak for themselves, if Your Honor please, and I will object to the question.

The Court: What are those letters?

The Witness: These are letters asking for payment from the agent, and they are more or less standard in wording and [253] as to form.

Mr. Garrison: Q. Those are sent to any agent who is late in his payment?

Mr. Bronson: Same objection, telling him what you want him to say.

Mr. Garrison: Q. Did you send them to any other agent besides Mr. Lotz in these years in question?

A. We sent them to any and every agent who becomes past due.

Q. And what do you mean when you talk about an agent who is delinquent?

A. I mean simply that he has not paid us his account by the end of the term stated in his contract.

Q. And if he pays it within a short time thereafter?

(Testimony of Gerald A. Hatfield.)

A. Nothing occurs. It is of no concern to us, except that as soon as the time limit runs out on that particular agent we will send him a letter, something like that, to remind him it is due.

Q. No action is taken against him?

Mr. Bronson: Same objection, telling him again what to do.

Mr. Garrison: Q. Are there any penalties involved, or what do you do with respect to that agent in those circumstances?

A. Well, as I said, we simply send him a letter, and if he pays, fine, no penalty of any kind. [254]

Q. Supposing he doesn't pay for sixty or ninety days after the payment is due?

A. We send him a second letter and perhaps a telegram.

Q. And are there ever any penalties involved?

A. Never.

Q. Is that one of the problems of running an insurance company in relation to your agents?

Mr. Bronson: Telling him what the problems of insurance are, let him——

Mr. Garrison: Q. Can you tell us what the problems of——

Mr. Bronson: My objection is you put in a suggestion each time and it imparts an answer, then the bell is rung, Your Honor. I ask Your Honor to admonish this experienced practitioner to desist. There is always the suggestion that the witness needs the assistance of counsel. If Mr. Garrison doesn't want to fall into that situation.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: No, I wouldn't.

Mr. Bronson: I don't like to be in the position of jumping up all the time, but I don't propose to sit quiet while he——

The Court: His leading position is correct, we will concede that.

Mr. Garrison: Yes, sir, Your Honor.

The Court: All right, let us proceed.

Mr. Garrison: Q. I don't like to lead you. Just tell [255] us, Mr. Hatfield, what these letters, or what relation these letters have to the ordinary conduct of an insurance company?

A. I don't see how, as far as the credit relations between an agent and his insurance company are any different than the credit relations in any other business. An agent, certain agents are prompt pay; certain agents are slow pay, and certain agents vary. That is the same in this business as any other business.

Q. Anything different in respect to your relations with Mr. Lotz and some of your other agents?

Mr. Bronson: Object to that as incompetent, irrelevant and immaterial to this case what he is doing with other agents.

The Court: Not concerned with other agents, I take it.

Mr. Garrison: No, excepting that it bears out the problem I am trying to point up.

Q. Now, then, when the American Fidelity and Casualty Company entered the Lotz office, I believe

(Testimony of Gerald A. Hatfield.)

that was testified to as being in November—December of 1950, is that a fact?

A. I thought it was January of '51, but I am not certain.

Q. In either event, the latter part of '50 or the first of '51, what was the credit period that you were allowing Mr. Lotz under your then contract?

A. Twenty-five days.

Q. And what credit period did the American Fidelity and [256] Casualty Company allow him under their contract?

A. Sixty days, I believe.

Q. And what retention arrangement did you have with Mr. Lotz then?

A. Fifteen per cent.

Q. And what retention did the American Fidelity and Casualty make with Mr. Lotz?

A. I don't know.

Q. Now, then, did the premium volume that you received from Mr. Lotz during that year of 1951 decline?

A. You mean did it decline in 1951?

Q. Yes. A. Yes, sir, it did.

Q. Mr. Bronson has referred to page 19 of the Lester, Herrick and Herrick report and read off the writings in your company by Mr. Lotz by month and called attention to the fact that in April only \$433.00 of premiums had been written, and in June more cancellations occurred than premiums written; is that true? A. That's correct.

The Court: What is that date?

(Testimony of Gerald A. Hatfield.)

The Witness: 1951.

Mr. Garrison: That was in 1951.

The Court: What month?

The Witness: May and—— [257]

The Court: May and June?

The Witness: No, April and May, that was the four three three period.

Mr. Garrison: Q. And May was minus \$2,700.00. Now, in the months of April and May, tell me what volume was written on the American Fidelity and Casualty?

A. Month of April, \$25,713.00 was written with American Fidelity and Casualty, and in the month of May, \$83,753.00.

Q. So that is that, the competition that you referred to earlier when you said you had to meet that competition?

A. Yes, it certainly was indicative that I had lost the account.

Q. What was the next conversation that you had with Mr. Lotz regarding his account?

A. Well, it was during my visit here in the latter part of April or first part of May, 1951, and I asked him why I wasn't getting any more business.

Q. What did he say?

A. Well, he said that he had a better contract with American Fidelity.

Q. Did he tell you what it was?

A. Told me he had a longer credit period and that he had a guaranteed commission.

(Testimony of Gerald A. Hatfield.)

Q. What do you mean by "guaranteed commission?"

A. I mean that his commission under his American Fidelity [258] contract were guaranteed to amount to at least twenty per cent.

Q. Were you giving him any such guarantee?

A. No, sir.

Q. And that is the conversation you had at that time? A. Yes.

Q. Then when did you next talk with him?

A. Well, it was probably still during my visit, I was mulling over the situation in my own mind as to what we could do to get the account back. I asked him if I gave him a broader contract if I could get business from him again, and he said yes, and I asked him what he needed and he said he needed seventy-five days for a credit period, and he would also like for me to give him a twenty per cent guaranteed commission.

Q. Is that the competition you had reference to when you said you had to meet it?

A. That's right.

Q. Now, the next time you talked to him, I believe you testified, was when he came to Chicago in August? A. That is correct.

Q. And did you discuss that same subject with him on that occasion? A. That's right.

Q. And what was that conversation?

A. We again—we talked about the credit period, what he needed to operate with, the amount of retention, Mid-States [259] retention, that is, and also

(Testimony of Gerald A. Hatfield.)

the subject of paying him an advance commission came up, that I could allow him an advance commission in order to meet this twenty per cent guaranteed commission he had from the other company, that is why we finally agreed upon making a fifteen per cent advance.

Q. That was suggested to induce Mr. Lotz to make that contract with you? A. Yes.

Mr. Bronson: That calls for his conclusion, leading and suggestive.

Mr. Garrison: Withdraw the question.

Q. Mr. Lotz did make the contract with you on those terms? A. Yes, sir.

Q. That is what you meant when you said the competition? A. That is correct.

Q. Mr. Hatfield, Mr. Bronson asked you about loss ratio in your company in 1951, and made the point that it was seventy-one point one. Did the loss ratio for business written in your company in 1951 change by the month?

A. Yes, loss ratio always fluctuates by month, that's correct.

Q. And did it get higher in the latter part of '51 as compared to the earlier part of '51.

A. Very definitely.

Mr. Bronson: Suggesting the answer, Your Honor. I [260] object.

Mr. Garrison: Q. Tell us what the loss ratio was by months in the Lotz agency in 1951, and tell us why it became higher at the end of the year?

A. Well, I can't tell you by month.

(Testimony of Gerald A. Hatfield.)

Q. You have the figures?

A. I have them in my briefcase, I believe.

Q. Let's get them.

A. I know what you are referring to. That doesn't have the loss ratio figures on it. Those are by year, isn't it?

Q. Do you have a record of those figures?

A. These figures are just by year, Mr. Garrison.

Q. Will you get the figures from your briefcase, please, to show the loss ratio by months?

(Witness securing documents.)

A. Now, these loss ratios, figured by month, are those I computed this morning from the figures that were sent to us.

Q. Just give them to us.

A. In the month of January he had a loss ratio of 66.8.

The Court: 1951?

The Witness: January, 1951, yes, sir. Is 66.8 per cent. February 40.7 per cent, March 70 per cent even, April 112.4 per cent, May 83.5 per cent, June 75.4, July 45.8, August 36.9, and that is as far as I got in my computation.

Q. I see. And do you have any figures as to the loss ratio [261] in 1952?

A. Yes, the year 1952?

Q. Yes.

A. For the year 1952 the loss ratio was 31.6.

Q. The total, but the month, can you give it to us by the month?

A. No, I don't have that by the month.

No. 14695

United States
Court of Appeals
for the Ninth Circuit

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Appellants,

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Appellees.

Transcript of Record

In Three Volumes

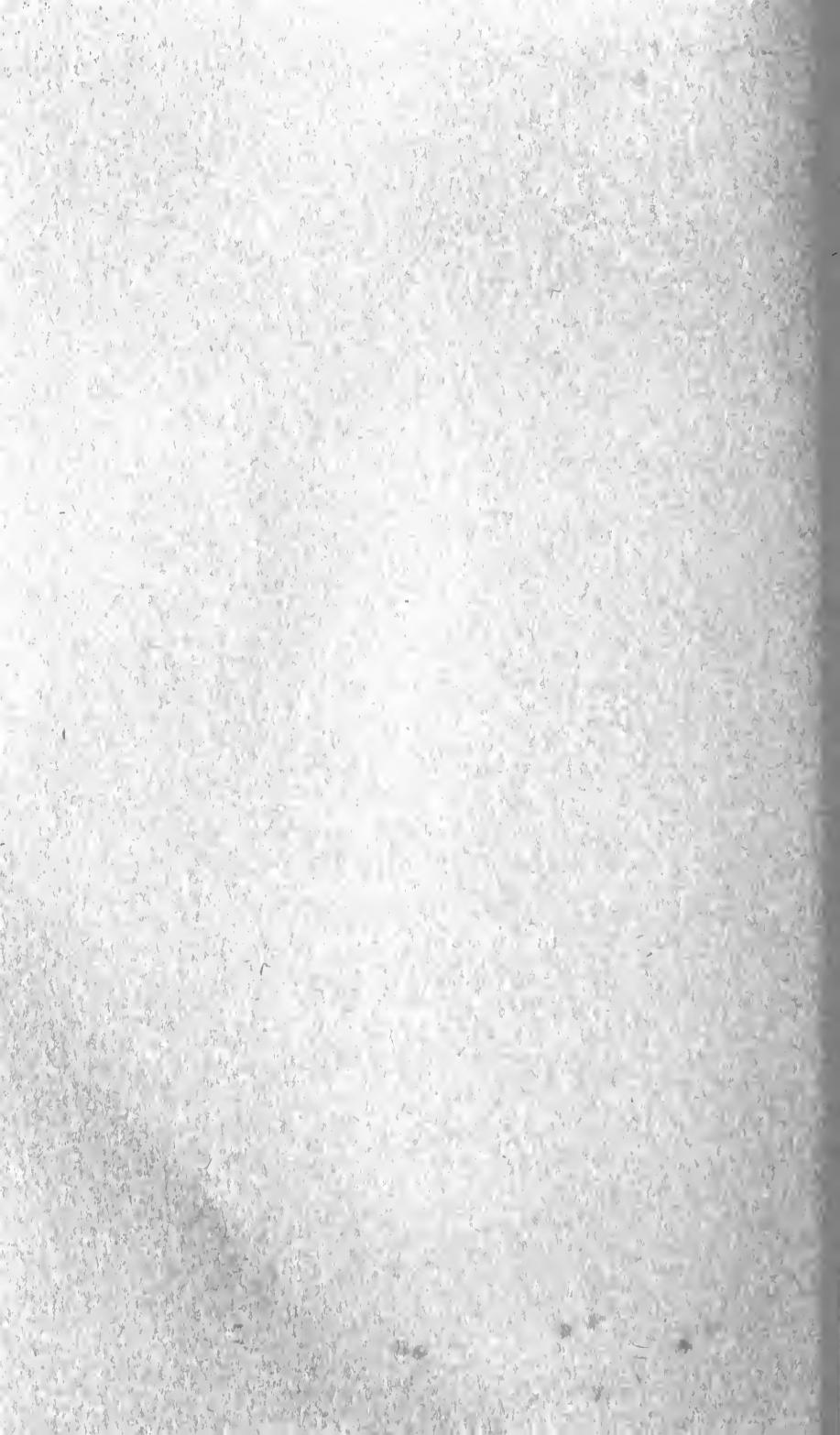
VOLUME II.

(Pages 401 to 820, inclusive.)

Appeal from the United States District Court for the Northern District of California, Southern Division

FILED

JUL 20 1955



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(Testimony of Gerald A. Hatfield.)

Q. Mr. Bronson asked you about the average commission of twenty-seven per cent that Mr. Lotz paid, asked if you knew that was the commission he was paying to his sub-agents. Let me ask you, Mr. Hatfield, is that question of the commission that a general agent pays to his sub-agent a matter within the control of the company?

A. No, not under our control.

Q. Just describe the position of a sub-agent in relation to the company in that respect.

A. The sub-agent has no direct relation with the company, his dealings are all direct with the general agent.

Q. Well, tell me about the relationship of the general agent and the company.

A. Well, under the retrospective agreement the general agent is free to offer rates of commission to sub-agents that he feels he needs to offer in order to get the business.

Q. How would you describe the general agent in relation to the company, what would be the description you might give? [262] Is he an independent contractor insofar as—— A. Yes.

Q. ——commission is concerned?

A. Yes, sir.

Q. And what interest does the company have in the commission the general agent pays?

A. We have no interest.

Mr. Bronson: The witness agreed with you for us that the general agent is an independent contractor?

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Insofar as the establishment—

Mr. Bronson: I didn't understand the question that way. We thought it was their contention it was a trust relationship.

Mr. Garrison: Well, it is.

The Court: The testimony has to do with his agents, is that it?

Mr. Garrison: Yes, insofar as the establishment of the rate of commission with his sub-agents, that is the matter that the company has no influence, control or right to interest itself in.

Mr. Bronson: May I have the question?

(Question read by the Reporter.)

Mr. Garrison: Does that satisfy you, Mr. Bronson?

Mr. Bronson: Just wanted to hear it read. I am always satisfied when I get an answer I asked for.

Mr. Garrison: Q. I am talking about, of course, the [263] right of the general agent to establish the commission of his sub-agents.

A. That is correct.

Q. That is a matter that he decides in his own good judgment operating his own business?

A. That's correct.

Q. Then the question was asked you by Mr. Bronson regarding whether or not you knew that Mr. Lotz was paying thirty per cent commission, and he read from your testimony in the previous trial that you did know he was paying thirty per cent commission, and then we read on a little more and found that had reference to trailer homes. Will

(Testimony of Gerald A. Hatfield.)

you tell the Court what you meant when you said trailer homes and how that enters into the amount of commission.

A. Well, trailer homes—I am sure you have seen these long trailers that people live in and tow behind their automobiles, anywhere from fifteen to forty feet long. Actually they are mobile homes, is what they are, and we have, Mid-States, as well as some of the other companies, have specialized in writing insurance on mobile homes. Writing insurance on mobile homes is an altogether different type of risk than automobile risk, because you're actually writing on a movable dwelling. We have had now insurance on mobile homes for a period of ten or more years, and every year we are always having a phenomenal loss experience. Our loss ratio on [264] mobile homes has never exceeded thirty-five per cent.

Now, when I was referring to thirty per cent commission which I had heard that he had offered to an agent, he had offered that business on mobile home writings exclusively, and he could very well and very profitably pay thirty per cent commission for that type of business. But also in that letter I told him he was unwise to offer thirty per cent and I didn't think it was necessary for him to do it.

Q. Competitively, you mean?

A. Yes. The thirty per cent commission had nothing to do with his automobile business.

Q. What was your interest in the subject of his payment of any commission?

(Testimony of Gerald A. Hatfield.)

A. Well, the reason it came to my attention was that he had contacted a sub-agent of our general agent in Los Angeles. In other words, he had contacted our other agent's business and had offered this sub-agent a higher rate of commission than our Los Angeles agent was paying, so that caused me to be on the hot seat with our Los Angeles agent.

Q. In other words, that was not a control of Mr. Lotz' commissions as such, but keeping peace in the family?

A. That's correct. [265]

Q. Mr. Bronson called your attention to page 30, your testimony in the other trial. It is a statement—a question and answer appearing on line 21 where you were asked:

“Question: What is the fact?

“Answer: The true fact is, after checking my records, he actually owed Mid-States \$62,000 at that time.”

You were referring to the month of August 1951. You remember that?

A. Yes.

Q. Can you tell us whether that account was late or delayed, or whether it was current, paid up?

A. Month of August account?

Q. Yes. A. Yes.

Mr. Bronson: I would like to know what the word “current” means now. That is a new meaning applied by the witness; that is past due, but it is current.

Mr. Garrison: Q. Well, just tell us the condition.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: Couldn't you answer what month it was a settlement for?

Mr. Garrison: Q. Do you recall the facts regarding the month of August in Mr. Lotz' account whether or not at the time you testified at the trial you were referring to payment of the account by Mr. Lotz that was overdue or whether it was within [266] his contract period?

A. It was my recollection the August account was paid on time.

Q. So that when you referred to the amount as \$62,000 in your testimony at that trial, you weren't talking about any account that was late?

A. No, no.

Q. When you were in Mr. Mead's office in respect to this statement that Mr. Smead prepared on the 5th of December, Mr. Bronson asked you whether or not Mr. Mead had reproached you regarding anything in connection with the taking of the statement, and you said no.

A. That is correct.

Q. It is a fact, is it not, that as appears on the statement Mr. Mead acknowledged the execution of the document as a notary?

A. That's correct.

Q. Did he do that in your presence on that occasion? A. He did.

Q. And did he express any question regarding the statement at all? A. No, sir.

Q. And at that time he was representing Mr. Lotz? A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. And Mr. Lotz likewise signed the document?

A. He did.

Q. And in Mr. Mead's presence? [267]

A. Yes, sir.

Q. Was there any altercation between lawyer and client as to whether he should or shouldn't sign it? A. Absolutely none.

Q. Were there some changes made in the statement by either Lotz or Smead at the time of this meeting?

A. Yes, there were a few changes made.

Q. Mr. Mead presiding over the changes?

A. Yes, sir.

Q. Mr.—counsel for Mr. Lotz asked you a moment ago regarding commingling, and he did not distinguish between whose funds were being commingled. May I ask you, Mr. Hatfield, whether or not, if there is commingling in respect to funds of certain principals in the insurance business, it is permissible?

A. You mean the funds of various insurance companies being grouped into one account?

Q. Certainly. A. Yes, it is.

Q. In other words, under the common practice in insurance a trustee account—just describe how an agent is required and commonly keeps trusted funds?

A. Well, an agent is required to keep a trustee account into which he is to pay the premium monies due his company. He is not required to keep a separate trust account for every company which he

(Testimony of Gerald A. Hatfield.)

represents. Some agents represent as many as sixty [268] companies. That would be a burdensome thing to do.

Q. How about his own funds?

A. You mean his own personal funds?

Q. His own personal funds.

A. He is supposed to keep those separate and not co-mingle with the company's funds.

Q. But when you had reference to commingling you had reference to which funds?

A. Reference to his personal funds.

Q. So far as this case is concerned, is there any criticism of the maintaining in one account the funds of American Fidelity and Mid-States Insurance Company as far as you are concerned?

A. No, sir.

Q. And the gentleman asked you your opinion regarding Mr. Lotz and you expressed an opinion. Will you tell us whether or not you had reference to any particular period of time you gave that answer?

A. Well, he threw that question at me pretty fast. At the time we had been talking about before November of '51, and of course, before November of '51 I had no question of Mr. Lotz' integrity or his honesty. But since this thing has come to light I have a great deal of question about it.

Q. And that has to do with the contract that Mr. Lotz had with you?

A. Has to do with the fact that he did not live

(Testimony of Gerald A. Hatfield.)

within his [269] contract, and also he concealed many things that were vital to me.

Q. And Mr. Hatfield, does the contract contain provisions respecting duties of the agent?

A. You mean as respects——

Q. Handling of funds?

A. Yes, sir. I think the contract states definitely he shall place them in a trustee account.

Mr. McKinnon: Which contract are you referring to?

Mr. Garrison: The contract that was in force in 1951.

Mr. McKinnon: Referring to the——

Mr. Garrison: Executed on September 1, 1951, plaintiff's Exhibit 2.

I would like to read, if the Court please, for the record, paragraph 4 of that contract.

“The Agent shall, unless specifically otherwise directed in writing, collect all premiums on business written for the company and transmit such premiums to the Company within 60 days after the end of the month in which the business was written. All premiums received by the agent shall be held by such agent as trustee for the company. The privilege of taking commissions provided in paragraph ‘9’ of this agreement from premiums received by such Agent shall not be construed as changing the [270] relationship of the respective parties hereto or of the fact that the premiums received are trust funds. The keeping of an account with an Agent on the Company's books, as a creditor and debtor

(Testimony of Gerald A. Hatfield.)

account, is declared a record memorandum of business transacted, and either such keeping of account nor alteration in compensation rate, nor failure to enforce prompt remittance for compromise or settlement or declaration of balance of account, shall be held to waive the understanding that the premiums collected by the agent are trust funds or change the character of such premiums. The Company shall render to the Agent monthly, not later than the 25th day of the month following that in which the business is written, an account of money due the Company on the business placed by the Agent, and the balance therein shown to be due the Company shall be paid by the Agent."

Q. Now, did Mr. Lotz do those things in the year 1951? A. Yes, sir.

Q. You mean insofar as Mid-States is concerned did he——

Mr. Bronson: Wait a minute. That calls for his conclusion; it is too broad, did he do those things. You can't ask the question that way, read a portion of the agreement and then—— [271]

Mr. Garrison: Q. Did Mr. Lotz violate his contract in provision 4 I just read?

Mr. Bronson: That calls for the conclusion of the witness. He can state facts.

The Court: Answer that by developing the facts.

Mr. Bronson: That is all.

Mr. Garrison: I have a brief re-cross examination.

The Court: Well, it is time for tea now.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [272]

The Court: Don't pay any attention to the Grand Jury. Go right ahead with your work. Go right along with the case. You never can tell when the Grand Jury is going to come. Don't let that bother you at all.

Mr. Garrison: I have one or two matters that I would like to complete, if I may, as part——

If you will take the stand.

GERALD A. HATFIELD

resumed the stand.

Redirect Examination—(Continued)

Mr. Garrison: Your Honor please, the last three questions that were asked before the adjournment, there were objections to the last two which were, I take it, sustained. The third question before was on the same subject but there was no objection to it, and I assume that the objection runs to all the questions on that subject and the ruling would be the same, so that the answer would not——

The Court: You can't anticipate me. You better protect the record.

Mr. Garrison: Thank you. Would you read the third question back, Mr. Reporter?

(Record read.)

Mr. Garrison: I would like to withdraw the question and [273] ask the answer be stricken, if the Court please.

The Court: No objection?

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: No objection.

Mr. Garrison: Thank you.

The Court: It may go out.

(Whereupon other matters were considered by the Court.)

The Court: Proceed, gentlemen.

Mr. Garrison: Thank you.

Q. Mr. Hatfield, Mr. Bronson asked you this morning some questions in respect to Defendant's Exhibit G, which is a letter addressed to you dated June 6, 1951. Ask if you would look at that letter and call your attention to the reference in the letter to the term "trouble". Would you read that sentence, please?

A. "Again, I must say if we can't get better representation in California than Joe Lotz we will never stay out of trouble."

Q. And had you been having some trouble with Mr. Lotz at that time?

Mr. Bronson: We will object to that if it is an attempt to vary the thing. The letter wasn't written to him—by him.

The Court: Read the question.

Mr. Bronson: Objected to as calling for a conclusion of the witness. He asked him to read the letter and the witness [274] started to give an explanation. Then he asked him if—had he been having trouble with Mr. Lotz. I must object to any statement by the witness attempting to translate the meaning of the sender of the letter, Mr. Titus.

(Testimony of Gerald A. Hatfield.)

The Court: I asked the reporter to read the question.

Mr. Bronson: I am sorry.

(Record read.)

The Court: Read that letter again.

The Witness: "Again, I must say if we can't get better representation in California than Joe Lotz, we will never stay out of trouble."

The Court: Did you write that letter?

The Witness: No, I didn't write it.

The Court: Who did?

The Witness: Mr. Titus.

The Court: Objection will be sustained.

Mr. Garrison: Very well, Your Honor. Mr. Titus is here.

Q. And I asked you this morning, Mr. Hatfield, regarding certain loss ratios in the first part of 1951, which you gave us, and you said you did not have the loss ratios for the later months.

A. That's correct.

Q. Have you since computed those?

A. Yes, sir.

Q. And will you give us the loss ratios on the business that [275] Mr. Lotz placed in your company for the months subsequent to August in 1951?

A. Yes, sir. In September 1951 it was 121.6; in October 1951, 48.3; November 1951, 104.8; December 1951, 118.7; and the loss ratio for the complete four months is 92.6.

Q. What was the loss ratio for the year?

A. 71, I think it was in the record, wasn't it?

(Testimony of Gerald A. Hatfield.)

Q. You gave us the loss ratio for 1952. Would you give that again, please?

A. 1952 is 36, I believe it was.

Q. And when did you cancel the business that had been placed in your company with Mr. Lotz that he received from the Public Service Insurance Company and the American Fidelity and Casualty Company?

A. Well, the great bulk of the cancellations were effected in the latter part of—end of December and first part of January 1952.

Q. And the change in the loss ratio reflects those cancellations, does it? A. Very definitely.

Q. And the increase in the loss ratio in the latter months reflects that business, does it not?

A. Very indicative of the fact that the business we put on the last four months was highly substandard.

Q. That is the business you cancelled? [276]

A. That is correct.

Mr. Garrison: Cross examination.

Mr. Bronson: Am I going ahead——

Mr. McCallum: I have no questions, thank you.

Recross Examination

Mr. Bronson: Q. Now, your attention was called to an exhibit that is in evidence there, that is the September 1, 1951 contract, new contract, that you made with Joe Lotz. A. Yes, sir.

Q. You have that in mind. Can you recall that Mr. Garrison read to you article 4 of the agree-

(Testimony of Gerald A. Hatfield.)

ment? I have a photostat of it, the one on the first page here that has some reference to trust funds. You recall that reading, do you? A. Yes.

Q. All right. Now, it is true, isn't it, that that was the first contract you had with Joe Lotz, whether it was by formal printed contract or by letter, such as your agreement, the changes in the agreement that were made in May of 1951, that has any reference to trusteeing the funds that he collected as premiums? A. Yes, that's true.

Q. And that agreement, whatever its exhibit number is, the new agreement that you made September 1, 1951, was after the date of the cancellation of the American Fidelity and Casualty [277] Agency contract with Joe Lotz?

A. That is what I understand, yes, sir.

Q. Yes. Now, this is a form, I am using my copy rather than hunting for the other one, unless you can find it, I think it is either agreement one or two. I want to call your attention to this. It is a document that is on your—is printed and on your own stationery with your own name at the top.

Mr. Garrison: Which exhibit are you referring to?

Mr. Bronson: This is Exhibit 1 or 2, it is the September 1, 1951 agency.

Q. That was prepared by the counsel for the company?

A. I presume it was; I don't recall definitely.

Q. I want to read you a portion of the provisions of paragraph 4, not all of the sentences, that

(Testimony of Gerald A. Hatfield.)

starts there on the sixth line, Mr. Garrison. I will read it now.

“The keeping of an account with the Agent on the Company’s books, as a creditor and debtor account, is declared a record memorandum of business transacted, and neither such keeping of account, nor alteration in compensation rate, nor failure to enforce prompt remittance or compromise or settlement or declaration of balance of account, shall be held to waive the understanding that the premiums collected by the Agent are trust funds or change the character of such premiums.” [278]

Now, it is significant that you omitted to declare in that provision as circumstances that would not alter the trust character of the funds in the hands of the agent the payment by him of commissions to sub-agents, or the use of funds for the operation of his own business, and I ask you if that was not purposely omitted in the long history that your company has had in agency relationships?

A. I cannot say it was purposely omitted, no.

Q. With regard to this matter that elicited an objection, or an interruption by me this morning on the subject of independent contractor, that is the designation of that type of legal relationship as describing the relations in your mind that you had with Joe Lotz during this—. I want to read into the record, if the Court please, the short portion of the testimony from the trial of the bank case.

Mr. Garrison: If the Court please, we will object to the reading of any record of any previous

(Testimony of Gerald A. Hatfield.)

case in this case unless it is for the purpose of impeaching some witness.

Mr. Bronson: It is an impeachment.

Mr. Garrison: Let us ask the witness to read the record and then ask him if he were asked the question and gave the answer.

Mr. Bronson: I got to get formal now.

Mr. Garrison: No, but I don't think we ought to read wholesale from one transcript into this.

Mr. Bronson: That is all right; I thought we would go ahead as before.

Mr. Garrison: What portion are you referring to?

Mr. Bronson: It is marked there, it is the last half of the page.

Mr. Garrison: What page?

Mr. Bronson: Page 121.

(Witness reading transcript.)

A. Yes, sir. Isn't that the same thing I said this morning?

Mr. Bronson: The questions are supposed to go the other way. I won't attempt to answer that, I will just read it, let the Judge make his decision whether it is the same thing.

Line 13:

"Question: Now, you didn't, of course, ever make any audit of Mr. Lotz' books prior to going there and finding this condition, did you?

"Answer: No, sir.

"Question: The company doesn't do that as a matter of practice?

(Testimony of Gerald A. Hatfield.)

“Answer: That is right.

“Question: The agent is an independent contractor, keeps his own books and his own bank account?”

“Answer: That’s correct.”

Mr. Garrison: Would you read the next question also? [280]

Mr. Bronson: I am not asking the witness here, Your Honor, if—. Yes, I will read further if you wish, but I am not asking the witness if he so testified, because this is really the same case as we have here, only the trial of the bank.

The next question is:

“Question: And of course, you had no occasion to give any notification to the Anglo Bank at any time regarding Mr. Lotz or any other bank?”

“Answer: No, sir.”

Shall I go further?

Mr. Garrison: No, that’s fine.

Mr. Bronson: All right.

Q. Now, then, with reference to the figures you supplied us this morning, January to August loss ratios, in the first place the term “loss ratio”, when it expresses percentage, means percentage of the gross premium, does it not?

A. No, it means the per cent of loss, the ratio of loss to earned premiums; ratio of loss to earned premiums.

Q. Well, the earned premiums means gross premium amount; you don’t take any reduced amount?

A. Oh, no, that’s correct.

Q. In other words, you don’t take out your fif-

(Testimony of Gerald A. Hatfield.)

teen per cent retention, or your twenty per cent retention before figuring your loss ratio; it is taken on the full number of dollars that came in as premium, right? [281] A. Right.

Q. All right. Now, you say that you cast up these figures. As a matter of fact, they are available to you—for instance, in the month of January the loss ratio figures are available to you on or before the 15th of the following month, is that not true?

A. That is about right, yes.

Q. So that in January when Mr. Lotz showed a 66.8 loss ratio, that means that \$66 out of a \$100 of premium were actually paid out to policyholders on losses sustained for that period, right?

A. Right.

Q. Now, at that time you were taking out how much of the premium dollar for your retention?

A. In January of 1951?

Q. Yes. A. Fifteen per cent.

Q. On top of that—that would be eighty per cent of the premium dollar?

A. That's correct.

Q. That would be twenty per cent available to Joe Lotz for the various things we have talked about here that are a matter of his own settlement?

A. That is true.

Q. As costs of running his business, his cost of servicing [282] claims, his cost of paying for the acquisition of business from the sub-agent?

A. That's correct.

Q. Now, when you got down to April the loss

(Testimony of Gerald A. Hatfield.)

ratio figures there, which you say were available to you on or before May 15, was 112.4 per cent of the business for April; right? A. Right.

Q. So you knew he lost money that month if it didn't cost him a nickel to get his business, if it didn't cost him a nickel to service his claims, if it didn't cost him a nickel to run his business and acquire business from sub-agents; right?

A. That's correct.

Q. So he went behind. Now, in May you had 83.7, and you took out—that was available to you the middle of June, and you took out at that time fourteen or fifteen per cent?

A. Fourteen in May.

Q. Fourteen per cent. That would be 97 per cent. Of course, you knew an agency couldn't run on a 97 per cent take out of the business, didn't you?

A. Well, certainly I knew that. But I don't get excited over one month's loss ratio; no insurance company does, neither does your agent. How about that low month where he made a lot of money?

Q. Let us go on to June. I am talking about this time when you didn't know anything about the financial—let's take [283] June. This is in 1951. He had 75.4 per cent. And you knew when you had your 15 per cent to take that he couldn't run on the remaining 90 per cent out of the dollar, didn't you? A. On the remaining 90 cents?

Q. Yes, with a 75 per cent loss ratio, and you took 15 per cent for your retention, that leaves 90

(Testimony of Gerald A. Hatfield.)

cents. That makes 90, and leaves 10 cents on a dollar. A. Leaves ten.

Q. Can't run on that, can he?

A. No, he can't. He can for one month and pick it up the next month.

Q. The history of your dunning of this man and your insistence on his paying, and your statement that he was in trouble, and those things, don't those factors import that you knew that Joe Lotz couldn't any more run one month and go behind without help?

A. No, I don't agree with that statement.

Q. In May when you gave him 75 days instead of 25 days, isn't it a fact that you had to do that to let the fellow keep open and let him use that money for his own purposes——

A. That isn't——

Q. ——for a longer period than 25 days? You say that isn't true?

A. That is right, that isn't the reason I gave it to him.

Mr. Garrison: Just let him finish his answer, Mr. Bronson. [284]

Mr. Bronson: I am sorry.

The Witness: I have finished. I just said that isn't the reason I gave it to him.

Mr. Bronson: Q. You were talking about a 36 per cent loss ratio in 1952. That was after some wholesale cancellations, was it not?

A. That is also very indicative of getting rid of

(Testimony of Gerald A. Hatfield.)

sub-standard business and what you had to do to improve the loss ratio.

Q. Well, you happened to pick out one month, February, when he had 40 per cent loss ratio. Does that mean for one month out of the year he just didn't write sub-standard business?

A. Well, I can't answer that; I don't know.

Q. I'm reading from page 59. As I may not be within the scope of the cross examination, I would like to, like the privilege of bringing it out as an adverse witness.

This is on another subject, Your Honor.

Now, this is line 3, page 59 of the bank trial, Mr. Hatfield.

Mr. Garrison: Show it to Mr. Hatfield so he can know what you are——

Mr. Bronson: I am taking that page and that's on—— A. Line what?

Mr. Bronson: Q. The whole page, please, from line 3.

This is a question by Mr. McCallum:

“Question: Now, do you recall receiving from [285] Mr. Lotz a request for a supply of contracts the latter part of August 1951?

“Answer: For a supply of contracts?

“Question: Yes, policies, you call them policies rather than contracts?

“Answer: Oh, a supply of policies, yes.

“Question: In fact, you personally saw to it that he received those policies, didn't you?

(Testimony of Gerald A. Hatfield.)

“Answer: I instructed my home office underwriting department to ship them to him, yes.

“Question: I show you, Mr. Hatfield, the telegram bearing the date of August 24, 1951, addressed to Joe Lotz, purported to have been sent by you, and ask you if that was sent by you?

“Answer: Yes, sir, it was sent by me.

“Question: On that, about that date?

“Answer: On August 24, yes, sir.

“Mr. McCallum: May I read this, please, Your Honor?

“Addressed to ‘Joe Lotz, 315 Fourteenth Street, Oakland, California.

“‘2600 automobile and 1000 mobile home policies shipped 8/22. 2400 automobile policies being sent today. Gerald A. Hatfield.’”

And then there is an offer of it in evidence. [286]

The Witness: That is not an unusual request to receive.

Mr. Bronson: There is no question.

May I have a minute, Your Honor?

That concludes the examination, Your Honor.

Mr. Garrison: I have one or two questions, Your Honor.

Redirect Examination

Mr. Garrison: Q. Mr. Hatfield, referring to the functions of the general agent, Mr. Lotz, will you state to the Court what functions under your contract he performs himself without assistance or direction or supervision from the company and those that the company might supervise?

(Testimony of Gerald A. Hatfield.)

A. Yes, he performs all the necessary operations inherent in operating an agency, such as typing of the policies, issuing endorsement, collecting premiums for the policies, providing or effecting cancellations when they become necessary, renew premiums on the cancellation, the handling of losses and adjustment expense.

Q. How about the question of maintaining his bank accounts? A. And it is his duty.

Q. The company has nothing to do with that whatever? A. No, sir.

Q. So that insofar as that activity is concerned, that is his own business and under his contract he may do it in any way he pleases? [287]

A. Yes, sir.

Q. And when you answered my question that Mr. Bronson referred to, the question being the agent is an independent contractor, he keeps his own books and his own bank account, that is correct, you had reference to keeping his own books and his own bank account? A. Right.

Q. When I referred to the manner of keeping his own bank account you anticipate that he will abide by the law with regard to trustee funds, don't you?

Mr. Bronson: Object to that, Your Honor. That is a little below the belt.

Mr. Garrison: That, I think, goes without saying.

Mr. Bronson: I don't think it does at all. He gets an answer and then there is a colloquy between

(Testimony of Gerald A. Hatfield.)

the counsel and then comes the leading questions to rescue—. Your Honor, that is going too far, a very important issue in the case.

The Court: Let the question and answer go out. Proceed.

Mr. Bronson: If there is an answer.

The Court: The question and the answer.

Mr. Bronson: My hearing is failing, Your Honor.

Mr. Garrison: The fact of keeping of a bank account is a matter for the general agents.

Mr. Bronson: Again, we are supposed to hear the facts from the witness, the fact should come from the man on the [288] stand.

Mr. Garrison: I must indicate the subject matter I want the witness to answer.

Mr. Bronson: That isn't the way it is worded.

Mr. Garrison: Q. Isn't it a fact, Mr. Hatfield, that the banking of the funds of the agent is a matter for his own business judgment?

A. Yes, it is.

Q. Do you know what commissions were paid Mr. Lotz by the Mid-States Insurance Company in the year 1951?

A. I have a transcript of them here in my pocket.

Q. Will you tell us how much money was paid to Mr. Lotz by the Mid-States Insurance Company in the year 1950?

A. Take a little mental arithmetic.

Q. Well—— A. In the year 1950?

Q. In the year 1950, if it won't take too long.

(Testimony of Gerald A. Hatfield.)

A. No.

Q. You give us the approximate figure.

A. All you want is an approximate figure, isn't it? Is that all you want, an approximation?

Q. Yes, give us the approximate figure, the amount of commissions paid Mr. Lotz by the Mid-States Insurance Company.

Mr. Bronson: You mean premiums or commissions?

Mr. Garrison: Commissions. [289]

Mr. Bronson: May I inquire what the purpose of this is?

Mr. Garrison: I beg your pardon?

Mr. Bronson: What is the purpose? That is not an issue.

Mr. Garrison: You said he couldn't operate his business because the loss ratio—I want to show that he received very substantial commissions from the Mid-States Insurance Company.

Mr. Bronson: This is 1950?

Mr. Garrison: 1950.

The Witness: 1950, approximately \$69,000.

Mr. Garrison: Q. Can you tell us the amount of money that was either paid to him or credited to his account by Mid-States for commissions in the year 1951? A. Approximately \$30,000.

Q. And I believe you testified that—did you testify to the loss ratio for the year 1950?

A. Yes.

Q. What was that?

A. I don't remember what the figure was.

(Testimony of Gerald A. Hatfield.)

Q. What is the loss ratio for the year 1951?

A. I think it was read into the record at 71 per cent, wasn't it?

Q. That meant that after the retention by the company the balance was left as commission for Mr. Lotz?

A. That's right.

Q. And had the business been allowed to run off normally and [290] there had not been the difficulties that we have referred to here, Mr. Lotz would have received the net commission payable to him for that year's business?

A. Yes, sir.

Q. And you have the amounts of commissions for the years beginning 1947 right on down to 1951?

A. Yes, sir, I have them here.

Q. And did he receive substantial sums during those years?

A. He did.

Mr. Bronson: Object to that, the word "substantial" doesn't mean anything relatively.

Mr. Garrison: Q. Can you give us a total of those after you have computed the figures?

A. Yes, I can run a total.

Q. I won't take the time to have him do that now, but ask that go in at a later time.

In reference to the year 1951 did you understand my question to include both paid to Mr. Lotz and credited to Mr. Lotz?

A. No, I only gave what was paid to Mr. Lotz.

Q. What was paid or credited to his account by way of commission?

(Testimony of Gerald A. Hatfield.)

A. It looks like there was an additional ten thousand credited to him.

Q. And those amounts were, in the year 1950 and 1951, paid to him as commission after all loss and retention by the company [291] for its portion?

A. That's correct.

Q. All losses paid, loss expenses and company's retention?

A. That's correct.

Q. And that would be true for the commissions paid to him each year from 1947 on?

A. Yes, sir.

Q. I believe you testified, Mr. Hatfield, regarding the procedure for the payment of the premium by the sub-agent in respect to his commission, did you not?

A. I believe so.

Q. Now, assuming in Mr. Lotz' case that a particular policy was cancelled, either at the request of the assured or for any reason, and assuming a return of a portion of the premium was due to the assured—you understand me?

A. Yes, sir.

Q. What function would Mr. Lotz have with respect to the return of that premium to the assured?

A. It would be up to him to pay the assured.

Q. Out of what funds?

A. Have to take it out of his trustee account.

Q. So that would show on the bookkeeping between the general agent and the company as a debit item paid by him in return premium?

A. Yes, sir. [292]

Mr. Garrison: I think that is all.

Mr. Bronson: That is all, Your Honor.

The Court: Step down.

(Witness excused.)

Mr. Garrison: Call Mr. Smead.

RALPH L. SMEAD

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Court: What is your full name?

The Witness: Ralph L. Smead.

The Court: What is it?

The Witness: Ralph L. Smead.

The Court: Where do you live?

The Witness: In Santa Monica, California.

The Court: What is your business or occupation?

The Witness: I am an insurance agent and broker.

The Court: How long have you been so engaged?

The Witness: Since October 1953.

The Court: Is that your first experience in the insurance business?

The Witness: No, sir, I have had about eight or nine years in the business.

The Court: Where? [293]

The Witness: I have worked as a solicitor of insurance.

The Court: Where?

The Witness: In Santa Monica. I have worked for Mr. Lotz as a manager, and I have worked for the American Plan Corporation as a West Coast manager.

(Testimony of Ralph L. Smead.)

The Court: Been in the insurance business how long altogether?

The Witness: Between eight and nine years.

The Court: Take the witness.

Direct Examination

Mr. Garrison: Thank you, Your Honor.

I called Mr. Smead as an adverse party; he is a party defendant in this case.

Q. When were you first employed, Mr. Smead, by Mr. Lotz? A. October 1950.

Q. And prior to that time I believe you had been employed in Santa Monica? A. Yes, sir.

Q. And by whom?

A. By my brother, Ernest Smead.

Q. His business?

A. An insurance agent and broker.

Q. Had you had any employment with the Government?

A. Yes, sir, I worked for the Government for one year as a [294] compensation claims examiner.

Q. And you worked for Mr. Lotz how long?

A. From October 1950 until November 1951.

Q. And then you were employed by the American Plan?

A. From January 1952 until October 1953.

Q. In the year 1950 what were your duties for Mr. Lotz?

A. 1950 I was an underwriter for Mr. Lotz.

Q. And then you were given some other assignment, were you?

(Testimony of Ralph L. Smead.)

A. 1951 I was office manager, and then in later '51 I was his general manager.

Q. And as office manager, what were your duties?

A. Supervision of the office employees, primarily; supervision of underwriting and general office procedure.

Q. Accounting for the books, did you supervise that? A. Not as office manager, no, sir.

Q. And as general manager, did you?

A. Yes, sir.

Q. We have referred here previously to a reinsurance transaction involving Public Service Insurance Company and the American Plan, or the American Fidelity Insurance Company. I believe that occurred in the fore part of 1951. Do you recall that transaction? A. Yes, sir, I do.

Q. And will you describe the nature of that transaction?

A. That occurred, I believe, in July, and—
The Court: 1951?

A. (Continuing) And of course—of 1951, yes, sir. And it involved the reinsurance of a block of business by the American Fidelity and Casualty Company from Public Service Insurance Company.

Q. Was that reinsurance arranged by Mr. Lotz' office? A. Yes, sir, it was arranged.

Q. Did you participate in that deal?

A. Yes, sir.

Q. How was that accomplished, that particular insurance feature?

(Testimony of Ralph L. Smead.)

A. Well, that was handled on a reinsurance bordereau.

Q. What do you mean by that?

A. Well, where in that case American Fidelity and Casualty Company assumed the interest of Public Service Insurance Company on a bordereau reporting basis without cancellation of the policies or without notice to the public.

Q. The policies were continued in force, the Public Service policies? A. Yes, sir.

Q. The liabilities assumed by American Fidelity? A. Yes, sir.

Q. What do you mean when you use the term "bordereau"?

A. Well, that is a reporting form used that gives the policy holder's name and the policy number and the unexpired term, [296] premium.

Q. Bordereau furnished for each policy or bordereau—

A. No, it is one complete accounting form.

Q. Shows the entire block of business reinsured?

A. Yes, sir.

Q. And then how did American Fidelity—how were they paid for their liability assumed?

A. Well, they were paid 75 per cent of the premiums reinsured by Public Service directly.

Q. And that was for the unearned portion of those policies?

A. For 75 per cent of the unearned portion, yes, sir.

(Testimony of Ralph L. Smead.)

The Court: I didn't follow that. Will you read that?

(Record read.)

Mr. Garrison: Q. I assume that the American Fidelity and Casualty, the reinsurer, expected to be paid the full 100 per cent of the unearned premium on those policies?

A. Yes, sir; 25 per cent was to be paid by Mr. Lotz.

Q. So that was the way the deal was handled, the 75 per cent paid by the ceding company, or Public Service, 25 per cent to be paid by Lotz?

A. Yes, sir.

Q. Then how was Mr. Lotz going to profit by that transaction if he paid 25 per cent of the unearned premium to the American Fidelity?

A. Well, of course he had a contract with American Fidelity [297] where he was guaranteed 20 per cent, and I believe the company had a fifteen per cent retention.

Q. I see.

A. And his profit, of course, would be anything over the twenty, and be contingent on the loss experience developed.

Q. In other words, if the loss experience was anything less than the guaranty of twenty, that would come to him? A. Yes, sir.

Q. I believe in the month of August 1951 there was an account owing to Mr. Lotz to the American Fidelity and Casualty Company?

A. Yes, sir, there would be.

(Testimony of Ralph L. Smead.)

Q. And was a check sent to the American Fidelity and Casualty that did not clear the bank in that month?

A. I believe it was either July or August that it was sent; I believe it was August of 1951.

Q. And you remember the amount of that check?

A. Fifty some odd thousand dollars.

Q. And at that time had the Public Service transaction that we have been referring to been completed?

A. The reinsurance transaction, I believe it had, yes, sir.

Q. And had Mr. Lotz forwarded his 25 per cent of the unearned premium?

A. I don't believe he had, no, sir.

Q. Had you had any communications from the American Fidelity or American Plan regarding either of those two items? [298]

A. We had had, after the \$50,000 check was returned by the bank, refused payment, we had contact with American Plan, yes, sir.

Q. And how did you have that, what form?

A. By telephone.

Q. From whom?

A. From Mr. Hart, I believe, the call came from.

Q. Was that to you or Mr. Lotz?

A. I believe that was to both Mr. Lotz and myself.

Q. And you recall what the conversation with Mr. Hart was on that occasion?

A. Well, he wanted to know why the check had

(Testimony of Ralph L. Smead.)

not been honored by the bank, and he was somewhat disturbed because of the fact it wasn't honored. We explained to him, Hart, that it was returned by the bank because of uncollected items and not because of insufficient funds.

Q. Was there anything said at that time or about that time regarding the financial statement?

A. Yes, I believe there was.

Q. What was said?

A. Mr. Hart asked for a financial statement.

Q. Was that financial statement ever furnished him? A. No, sir.

Q. And subsequent to that did you have a further conversation with Mr. Hart regarding your coming to New York? [299]

A. Yes, sir, during the early part of August, 1951, we had a conversation by telephone, telephone conversation, and I think we also had teletype messages with him about that time.

Q. You did have a teletype receiving and sending unit in your office, did you?

A. Yes, we did.

Q. And American Plan had one in New York?

A. Yes, sir.

Q. And what was the conversation regarding the proposed trip to New York?

A. Well, the conversation was about the 25 per cent reinsurance funds that we had not paid to Public Service—or paid to American Plan, and also about a balance that was due, I think, August 15, and Mr. Hart said he wasn't too concerned about

(Testimony of Ralph L. Smead.)

the six thousand some odd dollars represented by the 25 per cent, but he was concerned if we couldn't pay that what were we going to do when our regular statements became due.

Q. And for what period was that August statement?

A. I believe that would be—at that time I believe we had a 75 day contract, so it would be 75 days previous.

Q. That would be a part of May, part of June?

A. Let's see. Probably would be the May account.

Q. And at that time did you have sufficient funds in your trustee account to pay the 25 per cent reinsurance item of \$6,600? [300]

A. I don't believe we had. I am pretty sure we hadn't paid it as of that time.

Q. Let me ask you, Mr. Smead, what bank accounts did Mr. Lotz maintain at that time?

A. He maintained a trustee account, and also an operating or commercial account.

Q. And into what funds did he deposit in the trustee account?

A. The premiums collected.

Q. And what funds went into the operating account?

A. Well, those were funds that he transferred from his trustee account as operating funds.

Q. Did you keep your premium funds segregated and in the trustee account?

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. Did you have a written contract with the American Fidelity and Casualty Company?

A. Yes, sir.

Q. Did that contract require you to keep your premium funds segregated and in a trustee account?

Mr. Bronson: The contract is the best evidence of what it contains; we will object on that score.

Mr. Garrison: Withdraw the question. We can cover it in another way.

Q. Did you go to New York?

A. Yes, sir. [301]

Q. And who accompanied you?

A. Mr. Lotz.

Q. And when did you make the trip?

A. I believe we arrived in New York August 13.

Q. Remember approximately the time of the day?

A. I think we arrived around eleven o'clock or so at the airport.

Q. Morning? A. Yes.

Q. And did you have a meeting with officials of the American Plan or the American Fidelity?

A. Yes, sir.

Q. Where?

A. In the American Plan office in New York.

Q. And who was present at that meeting?

A. Mr. Hart, Mr. Sudekum——

Q. Who was he?

A. Mr. Sudekum was executive vice-president.

Q. Of——?

A. American Plan. Mr. Will, who was, I believe,

(Testimony of Ralph L. Smead.)

secretary and treasurer of American Plan; Mr. Feller, I believe, was counsel for American Plan; Mr. Lotz and myself.

Q. And will you give us as best you can the conversation that occurred there between the different parties?

A. Well, we talked primarily about the status of Mr. Lotz' [302] agency, about the balances due companies and the accounts that he had receivable.

Q. Did you state to anyone at that time what they were? A. I believe we did, yes, sir.

Q. What did you say in that regard?

A. I believe we furnished the amounts, the records that we had.

Q. You recall what those were?

A. The amounts, I believe, that were due the companies—I don't know whether it was total amounts or not.

Q. What was due American Fidelity; let us take it that way.

A. I think it was two hundred forty some odd thousand dollars.

Q. What was due Mid-States?

A. I believe at that time it was approximately \$30,000.

Q. Other companies?

A. Other companies, I believe it was around ten or twelve thousand dollars.

Q. Yes. Go ahead, finish the conversation.

A. We advised that we had approximately \$75,000 in receivables at that time, and we talked about

(Testimony of Ralph L. Smead.)

continuing our business relations with the American Plan, which they would not consent to, and we advised that if we were to pay them off that we would have to stay in business and have to continue writing, and we spoke about Mr. Lotz going to Chicago to make arrangements, or attempt to make arrangements with Mid-States Insurance [303] Company, whom he was also under contract with, to see if he couldn't write more business with them and renew his relationships more or less and—and we talked about the only way we could pay off American Plan would be from our premium funds that were collected from our new writings, as we only had approximately \$75,000 in receivables.

Q. How would you do that?

A. Well, it would be on the credit period allowed by the new company—or under the new business written.

Q. Anything said in that conversation about whether you could or could not continue to represent the American Plan?

A. Yes, sir, it was understood that we were not.

Q. What was said about that and by whom?

A. Well, Mr. Hart said definitely he would not continue business relationships with us.

Q. And——

The Court: With you?

The Witness: With Mr. Lotz.

Mr. Garrison: Q. Were any arrangements made for you to leave New York, either you or Mr. Lotz?

(Testimony of Ralph L. Smead.)

A. Yes, sir, it was decided that I was to return to Oakland that same night, but Mr. Lotz going to Chicago a day or so later.

Q. What was said about Mr. Lotz going to Chicago, and what was he to do?

A. Well, first—excuse me. It was decided that it would be [304] best to telephone Mid-States in Chicago.

Q. Try to give us the conversation as best you can without the conclusion of it. If you can tell us what you said, that will be fine.

A. Well, Mr. Hart asked Mr. Lotz to call Mid-States in Chicago for Mr. Hatfield, and he asked his operator to place a call for Mr. Lotz and instructed her to place the call station-to-station.

Q. And the conversation regarding that particular act?

A. Yes, there was, Mr. Hart said that he did not wish for Mid-States to know Mr. Lotz was there in his office.

Q. Was the call placed?

A. The call was placed.

Q. Does that round out the conversations that occurred, as best you can remember them?

A. Well, I believe that probably covers that conversation. We had further conversations that night while we were having dinner with Mr. Hart, Mr. Sudekum, Mr. Feller, Mr. Lotz and myself.

Q. What was said at that time?

A. Well, at that time we talked about the contract with Mid-States, and it was said by, I think,

(Testimony of Ralph L. Smead.)

everybody present that everything depended upon whether Mid-States would allow Mr. Lotz to continue business with them.

Q. Wasn't there at some time or other some question by one of [305] the persons regarding what would happen if this thing went through?

A. Yes, I believe there was. Mr. Will, I believe—in fact, I know it was——

Q. Who is Mr. Will?

A. Mr. Will was the secretary and treasurer, I believe, of American Plan, and he asked the question, "Well, what will happen when Mid-States finds themselves in the position that we are now in?"

Mr. Hart remarked that he would worry about that if the time ever came.

Mr. Garrison: Your Honor wish to take a recess?

The Court: Take a recess.

(Short recess.)

Mr. Garrison: Q. Did you complete the substance of the conversation that occurred in New York?

A. We talked about, in addition to that, I believe, the possibility of Mr. Lotz obtaining a loan of some \$50,000 from a connection in Oakland, and also that we hoped to make an underwriting profit off of our business. I think that just about completes it.

Q. Wasn't there something said about Mr. Cass in Chicago?

A. I don't recall whether it was in the conversation in Mr. Hart's office or whether it was that

(Testimony of Ralph L. Smead.)

night during dinner, but there was a conversation regarding Mr. Cass in Chicago. [306]

Q. By whom and what was said?

A. Mr. Lotz said that while in Chicago he was going to contact Mr. Cass, and Mr. Hart asked Mr. Lotz definitely not to contact Mr. Cass. Mr. Hart stated that Mr. Cass possibly would still be friendly with Mid-States Insurance Company and he might divulge our plans with someone in that organization.

Q. Then I take it you returned to Oakland?

A. Yes, sir, I returned to Oakland.

Q. Mr. Lotz went on to Chicago.

A. Yes, sir.

Q. And what was said about what you were to do when you returned to Oakland?

A. Well, it was decided that——

Q. What was said?

A. Well, I said that I could possibly return to Oakland and collect some of the premiums that were due on the August 15th statement.

Q. And was that August 15 account delinquent at that time?

A. At that time it was not.

Q. And when was it payable?

A. It was payable on the 15th.

Q. This was on the 13th?

A. On the 13th, I believe, yes, sir.

Q. Did you have money in the trustee account at that time sufficient to meet that payment? [307]

A. No, sir, I don't believe we did.

(Testimony of Ralph L. Smead.)

Q. How much was that?

A. I am not sure what that amount was.

Q. And did you attempt to collect accounts on your return? A. Yes, sir, I did.

Q. Did you have any conversations shortly after your return with Mr. Hart? A. Yes, I did.

Q. And what—through what medium?

A. Through a telephone.

Q. And what were those conversations?

A. The conversations were about the collections, and also——

Q. What did you say to him and what did he say to you?

A. Well, I told him that, that I was having trouble collecting our balances, they actually weren't due from our sub-agents, and our accounts receivable was so low that definitely wasn't going to be able to pay that account at that time.

And also during those conversations I informed Mr. Hart about the subject of rewriting some business the Public Service Insurance Company in San Francisco was going to cancel.

Q. This is a different and a later transaction than the one we have talked about formally?

A. Yes, sir.

Q. What was said about that?

A. Well, I told him that Mr. Russell and Mr. Shay of the [308] Public Service Insurance Company contacted me and had advised me that they were having difficulties with the California Insurance Department, and they had to cancel some of

(Testimony of Ralph L. Smead.)

their business and have it reinsured, and we had been unable to assist them on a reinsurance bordereau such as we had transacted earlier, and it was necessary that they cancel the policies.

And I told Mr. Hart that we were planning on rewriting some of that business. I am not sure in my mind just where the plan to rewrite the business, the Public Service business developed, however, but it was during that period.

Q. You are not sure whether it was your idea or someone else's?

A. I am not positive, no, sir.

Q. All right. But is that the substance of that conversation?

A. I believe it about covers it, yes, sir.

Q. Well, as of what date did these phone calls occur?

A. Well, these calls occurred, I believe, on the 16th, 17th, 18 of August.

Q. 1951? A. 1951, yes, sir.

Q. Had you made some payments on the American Fidelity account up to this time?

A. Up to that time I don't believe we had. [309]

Q. And was there a May balance due shortly after this August you referred to?

A. Well, I believe the August statement I am speaking of would be the May balance.

Q. In other words, you were talking about the May balance when you referred to——

A. I believe that would be the——

Q. The balance payable in August?

(Testimony of Ralph L. Smead.)

A. Yes, sir.

Q. And you don't recall the amount of that?

A. I know we had one large, very large balance due about that time, but I can't recall offhand what the amount was.

Q. Well, in this conversation about cancelling the Public Service Company, cancelling the policies that they were required to cancel, was there any discussion as to the rewrite of that business in some other company?

A. Yes, sir, there was.

Q. In your conversation with Mr. Hart?

A. Yes, sir.

Q. What was that?

A. I told him that we planned on rewriting this business in the Mid-States Insurance Company. Mr. Lotz at the time of the first conversation was still in Chicago, I believe.

Q. Did you talk to Mr. Lotz at all?

A. I called Mr. Lotz in Chicago and told him I had been [310] discussing with Mr. Russell and Mr. Shay, I believe also Mr. Bond of the Public Service Insurance Company, and that we could pick up a large block of business on a rewrite basis, and I asked Mr. Lotz to contact the officials of Mid-States Insurance Company while he was there and advise them of what we intended to do.

Q. And were you continuing your efforts to make collections on the Lotz account during this period?

A. Yes, sir.

Q. And had not been successful?

(Testimony of Ralph L. Smead.)

A. Well, there were collections made, but not substantial.

Q. Then what next occurred in the course of events with respect to Mr. Hart?

A. Well, I believe on August 20—well, before August 20—on August the 18th or 17th, thereabouts, we had a teletype message from Mr. Hart stating that—to make reservations for he and Mr. Feller in Oakland for the following Monday, which we did, and confirm the reservations by teletype.

Mr. Hart arrived, I believe, on Monday, the 20th of August, 1951.

Q. Did you meet with them after they arrived?

A. Yes, sir, I did.

Q. Where did you first see them?

A. I believe I first met them in Mr. Lotz' office.

Q. And you remember the date? [311]

A. On the same day they arrived.

Q. The 20th?

A. The 20th I believe was the date.

Q. And what did they do there that day?

A. Well, they first, approximately the first thing they did was to ask for a tape on the amounts that we owed, and the amounts we had receivable.

Q. What do you mean by "tape"?

A. Well, from our bookkeeping department, the balances, to run from our records what the balances were.

Q. Tabulation? A. A tabulation.

Q. Was that provided for them?

A. Yes, sir, those figures were provided. In ad-

(Testimony of Ralph L. Smead.)

dition to that information, they also asked for listing of business owed by sub-agents to Mr. Lotz for the American Fidelity and Casualty Company. This information, I believe it took our girls two or three days to work up, and I don't believe we ever gave that particular information to Mr. Hart.

Q. Did you give them any figures regarding the affairs or financial condition of Mr. Lotz' office?

A. We gave them the figures that they asked for.

Q. That is what?

A. Receivables and payables.

Q. Would that include the balances due them and the Mid-States [312] Insurance Company?

A. That included all balances.

Q. And were those figures substantially different than the ones you reported to them in New York?

A. I think they were approximately the same.

Q. Now, what was occurring at this time when they were here with respect to the Public Service rewrite transaction?

A. Well, we were in the process of consummating the arrangement with the Public Service, I believe, on August 20. On the night of August 20 Mr. Lotz and myself met with Mr. Russell and Mr. Shay of Public Service in Mr. Lotz' office and executed a commission agreement payable to Russell and Bond who were underwriting managers and attorneys in fact of the Public Service Insurance Company.

Q. What was the arrangement with respect to

(Testimony of Ralph L. Smead.)

receiving unearned—the unearned premium on any——

Mr. Bronson: Is that part of the written agreement?

Mr. Garrison: Q. Did you have a written agreement with Russell and Bond regarding the payment by them of the unearned premium?

A. We had a written agreement with Public Service that covered only the commission and the fee that was to be paid to Russell and Bond as a commission and as a service fee for handling the business. I don't believe there is anything further.

Q. Do you know where that agreement is?

A. Well, the last time I saw it it was in Mr. Lotz' office.

Q. I see. And it provided for a commission to the managers of Public Service.

A. Provided for 25 per cent commission to Russell and Bond. It further provided for a 10 per cent service fee.

Q. Who was to pay that? A. Mr. Lotz.

Q. And did you have conversations, any conversations with Mr. Hart during these times regarding this Public Service deal?

A. Yes, sir, we did. In fact, we told Mr. Hart what we were having to pay for the business, and he said he thought it was all right if it was good business, we would make money on it. Prior to the time we completed the agreement, during the day of the 20th, Mr. Hart asked us to call Public

(Testimony of Ralph L. Smead.)

Service to be sure that we were going to take over that block of business.

Q. And did you call them?

A. Yes, sir, we did.

Q. And confirmed the fact that they would go ahead with it? A. Yes.

Q. How long did Mr. Hart and Mr. Feller remain in Oakland on that trip?

A. Two or three days, I believe, was the extent of their visit.

Q. Did Mr. Lotz return while they were still here? [314]

A. Yes, sir, I believe he was present. Yes, sir, he was present.

Q. Was he present when these conversations occurred that we just have been talking about?

A. He was present at the conversation when we called Public Service, he was present when we advised Mr. Hart of the commission arrangement with Public Service, yes, sir.

Q. What was the total amount of money involved in that Public Service rewrite?

A. Well, the gross amount that was, I think it was around \$150,000, I am not positive of the figure. I believe the net premiums that we received on the transactions amounted to approximately \$100,000.

Q. In other words, you received about \$100,000 from the Public Service Company?

A. About that. It might be in excess of that.

Q. And that represented the unearned premium reserve, so-called?

(Testimony of Ralph L. Smead.)

A. Well, that represented the—that represented 25—or 75 per cent of the premiums written, the gross premium written.

Q. That was figured on the basis of the remainder, remaining period the policies had to run?

Mr. Bronson: I can't quite hear that. Will you repeat it?

Mr. Garrison: Q. Was that figured on the basis of the remaining period that the policies had to run? [315]

A. We wrote short-term policies on the pro rata unexpired term of the Public Service policy, full premium of our policy.

Q. In other words, can you explain that to the Court how that was accomplished?

A. Well, ordinarily the policies are written on an annual basis or semi-annual, or longer terms, and these policies were written for shorter terms, on an average, than the annual policy. The Public Service had cancelled their policies, and they still had a time to run before normal expiration, and our policy took effect as of the date of their cancellation and continued until the normal expiration of Public Service.

Q. Was there anything said in any of the conversation with Mr. Hart regarding allowing the Public Service officials to know what Mr. Hart's connection with them was?

A. Yes, there was. Mr. Hart said he did not wish Public officials to be informed of his knowledge of the matter.

(Testimony of Ralph L. Smead.)

Q. Were they informed?

A. They were informed—they were aware of it, yes, sir.

Mr. Bronson: I didn't catch that answer.

The Witness: I said: Yes, sir, they were informed and aware of it.

Mr. Bronson: I didn't hear the question, some kind of a siren going out here.

Mr. Garrison: I asked him——

Mr. Bronson: Might be an ambulance. [316]

The Court: Pardon me, let the reporter read the question.

(Record read.)

Mr. Bronson: I didn't hear the answer or the question. I hate to interrupt again——

(Record read.)

Mr. Garrison: Q. Now, when did you complete the Public Service transaction so far as your arrangement with them?

A. Why, I think it was consummated on August 20; the mechanics of their cancellation and rewrite, I think, commenced during the latter week of August or the early week of September.

Q. And did the Public Service or their managers, Russell and Bond, undertake the rewriting—the writing of the new policies?

A. Yes, sir, that was part of the agreement that they were to handle the mechanics of the issuance of the new policies.

Q. In Mid-States? A. In Mid-States.

(Testimony of Ralph L. Smead.)

Q. And that was what their fee was paid for, the manual typing?

A. That was the 10 per cent fee.

Q. So that did you provide them with Mid-States policies? A. Yes, sir.

Q. And the cancellation notices?

A. Well, their policies carry their own cancellation notices.

Q. And Mr. Hart and Mr. Feller were still in Oakland at this [317] time on the 20th?

A. They were still in Oakland on the 20th, in Oakland, yes, sir.

Q. And did you see them every day while they were here? A. Yes, sir.

Q. Now, was there any conversation with Mr. Hart regarding this May balance that you say you were trying to collect and not succeeding?

A. Yes, sir, there was.

Q. And what was said about that?

A. We gave Mr. Hart, while he was here, the 20th or 21st, a check, I believe, for \$20,000 from Mr. Lotz' trustee account. And also while Mr. Hart and Mr. Feller were here we attempted to obtain a loan in the amount of \$50,000.

Q. From whom?

A. Well, we attempted to obtain the loan, I believe, from the Central Bank in Oakland, and also from a party that Mr. William Mead—now, I don't know whether he actually contacted that party or not, but I know Mr. Hart and Mr. Feller did attempt to make arrangements through the Central

(Testimony of Ralph L. Smead.)

Bank, and then Mr. Hart, I believe, failed to accomplish that loan.

Q. That was the loan to be made to Mr. Lotz by the bank?

A. Yes, sir, and based on Mr. Lotz guaranteed commissions with American Plan.

Q. In other words, Mr. Hart wasn't personally trying to [318] borrow any money?

A. No, it was on behalf of Mr. Lotz. Mr. Hart at that time agreed, or stated that he would advance from the American Plan corporation monies \$50,000 in order that the balances due could be paid to the company. He stated that the company had no knowledge—the company itself had no knowledge what was going on, and he wanted to actually keep our account from being delinquent.

Q. And how was that—did he make that loan?

A. I don't know whether he made it actually or not.

Q. Well——

A. I don't know what mechanics would be necessary for him to go through to do it.

Q. Did you show on your books a credit of that May balance?

A. I don't believe we did, no, sir.

Q. But that was the conversation regarding it?

A. Yes, sir.

Q. He said he would make the loan?

A. Yes, sir.

Q. Now, up to this time had you discussed the matter with the Mid-States Insurance Company?

(Testimony of Ralph L. Smead.)

A. This is August the 20th you are talking about?

Q. Yes. A. No, sir.

Q. When did you first discuss the matter with the Mid-States [319] Insurance Company?

A. This is the matter of the rewrite, Public Service?

Q. Yes, talking about Public Service now.

A. Well, the first time I talked to Mid-States, I believe, was in September or October, I am not definite, but I know Mr. Hatfield was, during that time, trying to contact Mr. Lotz to ask him about the business. I am not very definite when I first talked to him at all.

Q. I see. Then I assume you cannot say of your own knowledge whether Mr. Lotz did when he was in Chicago?

A. The only thing I can say is that Mr. Lotz said that he would. Now,—

Q. Do you know whether he said that he did when he got back? A. I am not sure.

Q. Well then, at any rate the Russell and Bond agency undertook this writing of this block of business, did they? A. Yes, sir.

Q. And what was done with either the policies or the face sheet of the policies, or the bordereau, so-called?

A. Well, there was no bordereau involved, it was individual policies.

Q. What did you do with the policies?

A. Well, the policies were—the Public Service

(Testimony of Ralph L. Smead.)

Company issued the notice of cancellation, and at the same time they typed the new Mid-States policy for the unexpired term. We [320] attached a notice to the Mid-States policy stating that it replaced the policy that was being cancelled by Public Service, to be sent to the assured advising them there was no change in their coverage, and this policy replaced their previous Public Service policy. And those were sent out—handled in the normal course of business.

Q. And wasn't there some communication or some document sent to Mid-States?

A. Oh, we sent them the regular daily report, yes, sir.

Q. Yes. And you recall when they were first sent?

A. Well, we sent the daily reports as we received those from the Public Service. They came in—there were quite a few girls working on the project. Public Service had, I think, practically their entire staff, and also we, I think, used some of our girls on it also.

Q. Now, were you writing any business in the American Fidelity and Casualty during this period?

A. No, sir, I don't believe we were.

Q. And where had you received the twenty—from what source had you received the \$20,000 you paid Mr. Hart for American Plan on the 20th?

A. Well, that was monies that we had collected from our regular accounts receivable.

Q. And do you know whether that came from agents writing business in the American Fidelity or

(Testimony of Ralph L. Smead.)

agents writing business in [321] the Mid-States or other companies?

A. Well, I don't know that, they came from agents writing for both companies, I am sure of that, but what the premiums were for, I am not sure.

Q. Now, when did Mr. Hart and Mr. Feller leave Oakland?

A. They left, I believe, on the 22nd of August.

Q. And did you have conversations with them regarding some contracts that were signed by you and Mr. Lotz?

A. Yes, sir, we did on the day, on the day they left Oakland.

Q. And where did those conversations occur?

A. In the Central Bank of Oakland in Mr. Earl Smith's office.

Q. And on what day was that?

A. It was the day they left; I believe it was the 22nd of August.

Q. What time of the day?

A. It was early in the morning.

Q. What was the conversation?

A. Well, they had executed some agreements for Mr. Lotz and I had to sign, and we went over to the bank and signed them.

Q. How many?

A. I believe we signed only one agreement.

Q. I beg your pardon?

A. Only one agreement, I believe.

Q. Did you sign it?

(Testimony of Ralph L. Smead.)

A. I signed an agreement, yes, sir. [322]

Q. I show you an agreement dated August 22 signed by American Plan Corporation, Mark M. Hart, President—correction. American Fidelity and Casualty Company, Inc., by the American Plan Corporation, Inc., Mark M. Hart, President, and Joe Lotz, and then below it says:

“Agreed: Ralph L. Smead.”

Is that the document that you refer to?

A. Yes, sir.

Mr. Garrison: I think I should read the document, Your Honor.

“Memorandum of Agreement between American Fidelity and Casualty Company, Inc. (hereinafter called the Company), The American Plan Corporation (hereinafter called the Manager) and Joseph Lotz, (hereinafter called Lotz) dated August 22, 1951.

“In consideration of the promises herein contained and other good and valuable consideration, it is understood among the Company, the Manager and Lotz as follows:

“1. Lotz as a former agent of the Company has collected or has in the course of collection premiums on behalf of the Company amounting to approximately \$240,000 (as evidenced by accounts current compiled and to be compiled by the Manager) which have not been remitted to the Company or the Manager. [323]

“2. Lotz is also obligated to pay to the Company

(Testimony of Ralph L. Smead.)

a sum approximating \$7,000 in connection with a reinsurance transaction.

"3. Lotz agrees that all the monies referred to in paragraphs 1 and 2 will be paid to the Company on or before September 15, 1951, and Lotz agrees that payments on account of said sums will be made by him at intervals as frequent as possible between the date of this agreement and September 15, 1951.

"4. Commencing immediately all premiums received by Lotz will be deposited directly to the account of the Company at the Central Bank, Oakland, California; Lotz may deduct therefrom a sum not to exceed 10 per cent for operating expenses, which deductions shall be a charge against Lotz and shall likewise be paid to the Company on or before September 15, 1951.

"5. Despite termination of Lotz' agency agreement and subject to further instructions of the manager, Lotz will

"a. Take all necessary steps to collect premiums from sub-agents and assureds and failing to collect will effect cancellations in accordance with established practice. [324]

"b. Supervise and pay losses and loss adjustment expenses.

"c. Effect collection of salvage and subrogation.

"d. Use his best efforts in every respect to protect the interests of the Company.

"6. The Manager agrees, termination of the agency agreement notwithstanding, to credit Lotz monthly with commissions of 20 per cent upon

(Testimony of Ralph L. Smead.)

earned premiums as provided in the agency agreement dated November 7, 1950, but Manager shall have the right to withhold payment thereof as an offset against monies due from Lotz to the Company or monies advanced by the Manager to the Company on Lotz' behalf. This paragraph 6 in no wise shall affect provisions of said agency agreement relating to the withholding of commissions earned in excess of said 20 per cent.

"7. So long as any of the items referred to in paragraphs 1 and 2 shall remain outstanding Lotz will

"a. Maintain his Trustee Account at Central Bank, Oakland, and not open a trustee account at any other bank or trust company.

"b. Not draw from the agency for himself a [325] sum in excess of \$150 a week and will not increase the salaries of any employees except with the specific consent of the Manager or its representative.

"c. Not draw any sums for travel, entertainment, etc., without the specific consent of the Manager or its representative.

"d. Not make any capital expenditures without the specific consent of the Manager or its representative.

"8. The Manager hereby appoints Ralph L. Smead as its representative and Lotz agrees that the said representative shall have full authority over the finances of the Company and in connection with the matters referred to herein subject to in-

(Testimony of Ralph L. Smead.)

structions of the Manager. It is understood that the designation of Smead as representative shall be at the pleasure of the Manager and that the Manager may terminate such appointment and appoint a substitute representative at its discretion which substitute shall have the same authority as the original appointee. It is understood that the appointment of a representative by the Manager shall cease when the items referred to in paragraphs 1 and 2 hereof are fully satisfied.

"9. Lotz agrees that expenses incurred by the [326] Manager in connection with the liquidation of the items referred to in paragraphs 1 and 2 hereof and in the operation and implementation of this agreement shall be proper charges against Lotz.

"10. Except as specifically provided herein, it is understood that this memorandum of agreement shall not be deemed a waiver of any obligations of Lotz or rights of the Company or Manager under the aforesaid agency agreement of November 27, 1950, or otherwise. Without any limitation on the foregoing, it is agreed that in the event of a default by Lotz of any of the provisions of this memorandum of agreement, the Company may without notice exercise its rights under paragraph 4 of the aforesaid agency agreement to take over and vest in itself Lotz' records, use and control of expirations.

"11. The parties hereto agree to execute such further and other documents as may be necessary

(Testimony of Ralph L. Smead.)

to carry out the intentions and objectives of this memorandum of agreement.”

Signed, as I have previously indicated, American Fidelity and Casualty Co., Inc., Lotz and Smead.

Mr. Garrison: Ask this be received in evidence.

The Court: It may be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 17 admitted and filed in [327] evidence.

(Whereupon Memorandum of Agreement referred to above was received in evidence and marked Plaintiff's Exhibit No. 17.)

Mr. Garrison: Q. Was this document actually executed on the 22nd?

A. As far as I know, yes, sir.

Q. It bears the date at the top, dated the 22nd, but it does not show that that was the date of the execution. But that is your recollection, is it?

A. Well, that is the date that, as I recall the date we signed it was the same date that Mr. Hart and Mr. Feller departed from Oakland.

Mr. Garrison: You wish to take the adjournment now?

The Court: You asked for it.

(Whereupon this cause was adjourned until 10:00 a.m. Thursday, May 6, 1954.) [328]

The Clerk: Mid-States Insurance Company, Plaintiff, and Anglo Bank versus American Fidelity and Casualty Company, further trial.

Mr. Garrison: Ready for the plaintiff.

Mr. McCallum: Ready.

Mr. Tiedeman: Your Honor, at this time, before the witness takes the stand, I would like to ask, on behalf of Defendant Lotz, for your leave to amend the remaining counterclaim in the answer of Defendant Lotz. It seems that Your Honor—Your Honor will remember that both counterclaims and the answer were demurred to and demurrer was sustained as to the first counterclaim.

The second counterclaim, as it stands, is left sort of dangling in the air, because as it was drafted the facts of the first counterclaim I incorporated into the second counterclaim, at least by reference, and in order to make any legal significance out of it I feel it should be amended to contain the facts, or at least some of the facts in the first counterclaim.

Mr. Bronson: We have no objection.

Mr. Garrison: I am not sure that I understand exactly what counsel has in mind. I certainly have no objection to any reasonable statement by Mr. Lotz in a counterclaim, but I [330] don't know now what you actually propose.

Mr. Tiedeman: Well, may I do this, Your Honor, draft——

The Court: Have you your amendment now?

Mr. Tiedeman: No, we want to ask your permission before we present it.

The Court: Counsel wants to know what it is.

Mr. Tiedeman: That is just what I was going to suggest. We will prepare it and submit it to you tomorrow.

The Court: Very well.

Mr. Garrison: With the understanding that, of course, not having seen it we can't agree at this time that it states a cause of action, because that was the issue we had before which Your Honor ruled upon.

The Court: Very well.

Mr. McCallum: Your Honor, my associate, Nathan Berke, has been called to Washington, and he asked me to advise Your Honor why he is not present and asked for your permission.

The Court: Was he associated with you?

Mr. McCallum: Yes, Your Honor.

The Court: How will you be able to get along without him?

Mr. McCallum: Since he hasn't said a word——

The Court: Very well, let us proceed.

Mr. Garrison: Your Honor, I had one question I wished to ask Mr. Hatfield in connection with some testimony he gave [331] before, if I could put him on just briefly out of order.

The Court: Very well.

Mr. Garrison: Mr. Hatfield, please.

The Clerk: Gerald A. Hatfield to the stand, heretofore sworn.

GERALD A. HATFIELD

was recalled as a witness for the plaintiff herein, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified further as hereinafter indicated:

Redirect Examination—(Continued)

Mr. Garrison: Q. Mr. Hatfield, you started to

(Testimony of Gerald A. Hatfield.)

give us the other day the amount of premium, amount of commissions that had been paid Mr. Lotz by the Mid-States Insurance Company, and you started to total them up, and it looked like it was going to take too long, didn't want to take the time of the Court, and ask you if you have totalled up those amounts? A. Yes, sir.

Q. Have you those totals? A. Yes, sir.

Q. Will you tell us what commissions were paid to Mr. Lotz by the Mid-States Insurance Company?

A. Yes, sir, you want the total by years, is that correct?

Q. Yes. [332]

Q. In the year 1947, which was the beginning year, his commissions were actually a minus figure of \$271.00.

The year 1948 he earned commissions of \$24,117.00.

The year 1949, \$48,862.00.

The year 1950, \$70,685.00.

The year 1951, \$31,704.00.

Q. Those are actual payments?

A. No, not in the year 1951. The actual payments in the year 1951 were \$27,806.00. In 1952—this is not a payment—this is a credit to his account, \$35,495.00. The year 1953, \$7,088.00. I didn't total them up, sir.

Q. Excepting the year '52 and '3, they were actual cash payments? A. Yes, sir.

Mr. Garrison: That is all. Any cross examination?

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: No.

Mr. Garrison: Step down. Thank you.

(Witness excused.)

Mr. Garrison: Mr. Smead, please.

The Clerk: Ralph L. Smead to the stand, heretofore sworn.

RALPH L. SMEAD

was recalled as an adverse witness for the plaintiff herein, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified further as follows: [333]

Direct Examination —(Continued)

Mr. Garrison: Q. You testified yesterday, I believe, Mr. Smead, that the commission contract that was entered into with the public service company was executed on August 20? A. Yes, sir.

Q. What time of the day or night?

A. I believe it was actually signed at night.

Q. And was Mr. Hart and Mr. Feller in the city of Oakland at that time? A. Yes, sir.

Q. Was that contract shown to them?

A. I am not positive whether it was or not.

Q. Was it discussed with them?

A. Yes, sir.

Q. Was the terms of it discussed?

A. Yes, sir.

Q. Now, at the time you met Mr. Hart and Mr. Feller at the Central Bank, you testified, I believe, that an envelope was handed to you as they were

(Testimony of Ralph L. Smead.)

leaving and that after they left you opened it and read it? A That is true, yes, sir.

Q. I show you a letter dated August 17, headed the American Plan Corporation, addressed to Mr. Ralph L. Smead, and ask if you can identify that.

A. Yes, sir, this is the letter that I was handed in the [334] sealed envelope.

Q. By Mr. Hart?

A. I believe it was by Mr. Feller.

Q. In Mr. Hart's presence? A. Yes, sir.

Mr. Garrison: Ask this be received as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 18 filed, admitted and filed in evidence.

(Whereupon Letter addressed to Mr. Ralph L. Smead, dated August 17, was admitted into evidence and marked Plaintiff's Exhibit No. 18.)

Mr. Garrison: I will read the letter for the record, if the Court please:

"The American Plan Corporation, 44 Wall Street, New York, N. Y.

"August 17, 1951.

"Mr. Ralph L. Smead, 315 Fourteenth Street, Oakland, California.

"Dear Mr. Smead:

"Under even date memorandum of agreement has been executed by Joseph Lotz which in part stipulates that you will serve as the representative of American Plan [335] Corporation with respect to

(Testimony of Ralph L. Smead.)

the ultimate liquidation of all monies referred to in paragraphs 1 and 2 in said agreement.

"As the representative of this corporation, you have full authority to deposit to the account of The American Fidelity and Casualty Company at the Central Bank in Oakland all monies received by Lotz, after taking into consideration the deduction prescribed in said agreement. You are to have full and supreme authority regarding financial affairs of Joseph Lotz, subject to instructions that may be transmitted to you from time to time by The American Plan Corporation, and in the event that you are prevented from performing your responsibility in any respect it will be your duty to notify immediately The American Plan Corporation.

"In consideration of the proper performance of your duties as representative and in the event the items referred to in paragraphs 1 and 2 of said agreement are completely liquidated by September 15, 1951, you are to receive a fee from us in the sum of \$1,000.00.

"Yours very truly, Mark M. Hart, President"

Q. And now, at this time, as I understand it, you were in the employ of Mr. Lotz? [336]

A. Yes, sir.

Q. And the items 1 and 2 of the contract referred to herein are the balances due American Fidelity and Casualty Company, are they not?

A. Yes, sir.

Q. What did you do after you opened that envelope and read this letter?

(Testimony of Ralph L. Smead.)

A. Well, I was very surprised of this offer, there had been no previous discussion of it. I talked with Mr. Earl Smith, Vice President of the Central Bank about it. He had a copy of the other agreement that was executed, and he advised me——

Q. No, you wouldn't be permitted to say what he said to you. You did have a conversation with him?

A. Yes, sir.

Q. And then what did you do after that conversation?

A. Well, the night, I believe it was the 22nd, I called Mr. Hart in Los Angeles and told him that it was not necessary to pay me anything for this and I didn't want any part of it.

Q. What did he say?

A. He said all right.

Q. When did you actually start the re-writing of this business that was taken over from the Public Service Company and placed in the Mid-States Insurance Company?

A. Well, the actual work began, I believe, the last week of August or the first week of September, 1951. [337]

Q. And Mr. Hart and Mr. Feller had in the meantime left Oakland and returned to New York, had they?

A. They had left Oakland, yes, sir.

Q. Did you hear from them shortly after that?

A. Yes, I did, from Mr. Hart.

Q. I beg your pardon?

A. From Mr. Hart.

(Testimony of Ralph L. Smead.)

Q. And in what manner did you have communications with him?

A. By telephone, and also, I believe, by teletype. There were, I know, several telephone calls during that period.

Q. And did those telephone calls involve this Public Service deal? A. Yes, sir.

Q. And what was said in those conversations by Mr. Hart?

A. Mr. Hart asked how the re-write of this business was progressing.

Q. The mechanics of it.

A. Yes, sir. [338]

Q. The mechanical work.

A. And he said he was very anxious to get that through, that his balances had to be liquidated. So we had originally made an agreement with Public Service, or Russell and Bond, for them to do the work themselves, but due to the fact that there was so much pressure we threw some of our girls in to do the work, too, and they did a lot of overtime work on the rewrites.

Q. What do you mean by "pressure"?

A. Well, he was demanding his money and they wanted to clear it up by the 15th.

Q. Clear it up by the 15th of what month?

A. Of September, 1951.

Q. You mean this was the end of August?

A. Yes, sir, during the last two weeks of August.

Q. Did you receive any instructions from anyone

(Testimony of Ralph L. Smead.)

in the American Plan Corporation or American Fidelity from New York regarding having the bank make automatic transfers from funds from the trustee account to the American Fidelity account?

A. Yes, sir, I had the teletype message, I believe it was Mr. Will, asking that we arrange with the Central Bank to automatically transfer the funds from Mr. Lotz' trustee account to an account of the American Fidelity and Casualty Company at the bank.

Q. Was that done?

A. We did not make those arrangements, no, sir. [339]

Q. They were not automatically transferred?

A. We had to make the transfers ourselves.

Q. Well, now, at about this time one of the accounts of Mid-States became due, did it not?

A. I believe there was an account due Mid-States in September, yes, sir.

Q. And do you recall the approximate amount of that?

A. I believe it was approximately \$27,000.

Q. Did you talk with Mr. Hart about that Mid-States' account in respect to the payment of it?

A. Yes, sir, I did.

Q. How did you do that?

A. By telephone. I advised Mr. Hart the account was due. I believe Mr. Lotz also talked to him. And that we had to pay Mid-States this \$27,000, so he agreed to it. He said we better pay it.

Q. So they were paid that amount?

(Testimony of Ralph L. Smead.)

A. Yes, sir, I believe in October.

Q. That had the effect of keeping their account current, then?

Mr. Bronson: I am sorry, I didn't hear that.

A. Yes, sir.

Mr. Garrison: I said that had the effect of keeping Mid-States account current by that payment.

Mr. Bronson: What was the answer?

The Court: The answer was, "Yes, sir". [340]

Mr. Garrison: Q. We were talking a little bit about reinsurance through a Bordereau Method and rewriting after a flat cancellation. You explained the differences, I believe, to the Court, those two insurance, types of insurance transactions. I want to ask you now in the Bordereau—withdraw that.

I believe you also said that the first Public Service transaction with the American Fidelity was by the use of a Bordereau.

A. Yes, sir.

Q. And that simply meant that a statement, a so-called Bordereau, were furnished the American Fidelity, setting forth the reinsurance arrangements?

A. Yes, sir.

Q. And that, of course, involved knowledge on the part of American Fidelity and Casualty Company that they were reinsuring that business in that amount?

A. Yes, sir.

Q. Now, distinguish for me, if you will, the flat cancellation and rewrite technique insofar as notice to the company assuming the liability is concerned.

A. Well, are you talking, Mr. Garrison, of flat

(Testimony of Ralph L. Smead.)

cancellation or the Public Service rewrite? Well, those weren't flat cancellations.

Q. Well, they were cancelled?

A. Cancelled by notice, yes, sir. [341]

Q. Yes, sir.

A. Under the Bordereau basis, it is an agreement between the two companies, where one company assumes the liability of the other through an insurance reinsurance treaty or agreement, and they agree to take over the liability as set forth by the Bordereau.

Under the cancellation and rewrite it is handled more or less as new business and new individual policies written on each risk.

Q. So that if Mr. Lotz, as he did have, had authority to accept new business, that business could be accepted without any notice to the Mid-States Insurance Company at all?

A. Well, of course we had to give them our daily reports.

Q. Well, up until the time they received the daily reports?

A. That is true, yes, sir.

Q. And as a matter of fact in this case you didn't give the Mid-States Insurance Company any notice of this business excepting through the daily reports?

A. That is true.

Q. No letter and no telegram was sent to them giving them this notice?

A. Not to my knowledge.

Q. The first thing, so far as you know, they knew anything about it was when they got this

(Testimony of Ralph L. Smead.)

bunch of six or eight hundred dailies that Mr. Hatfield testified to? [342]

A. Well, we sent the dailies through on that as they were completed, whatever bunches that might have been.

Q. In other words, that work was being done, as you say, over at Public Service office and then they delivered it to you and then they were mailed on?

A. Yes, sir.

Q. And it is your testimony, I believe, in the previous case, that you mailed those to Los Angeles and then they were ultimately sent on to Chicago?

A. Well, I believe we did send those to Los Angeles, which was our normal procedure.

Q. Well, now, as I understand your testimony, Mr. Smead, when you went to New York to this meeting you owed approximately \$280,000 to different companies?

A. Yes, sir, approximately that amount.

Q. And you only had \$75,000 accounts receivable? A. Yes, sir.

Q. And that was all discussed in this room, in Mr. Hart's office? A. Yes, sir.

Q. I believe you said that a plan was developed there to get another company to take business and use those premiums to pay off these balances?

A. That was the Mid-States Insurance Company, yes, sir.

Q. And of this \$280,000 that was owed, \$240,000 of it was [343] owed to Mr. Hart?

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. Thirty was owed to Mid-States?

A. Those are approximate figures.

Q. I understand, round figures, and ten thousand to miscellaneous companies?

A. Yes, sir.

Q. And then pursuant to that Mr. Lotz went out to Chicago to discuss with them regarding more business, is that what he did?

A. That was his purpose of going to Chicago, yes, sir.

Q. He already had a contract with Mid-States?

A. Yes, sir.

Q. But what had you, what had been the relationship with Mid-States just prior to this time?

A. Well, we had been producing very little business for that company.

Q. You had switched your——

A. Account to American Plan.

Q. ——to American Fidelity, not entirely, I take it?

A. Not entirely, no, sir.

Q. But for practical purposes?

A. Yes, sir.

Q. Well, it was necessary, was it, that the relationship be re-established in order that they would accept an increased volume? [344]

A. I believe that was it, and also Mr. Lotz thought he could get, possibly, a better contract with Mid-States.

Q. And the meetings adjourned on that note, did they, that that was the way in which the account of American Fidelity was to be paid?

(Testimony of Ralph L. Smead.)

A. Yes, sir.

Mr. Bronson: That's a conclusion of the witness, what he knows.

Mr. Garrison: Q. Well, now, let us see what actually happened, Mr. Smead, when you got back. Do you know, after your return, when you received a call from Mr. Hart or a teletype from Mr. Hart regarding collection?

A. After my return?

Q. Yes, sir.

A. I think it was the first day I was back.

Q. How did you receive that?

A. I think—well, I am sure I had both teletype and telephone conversations with Mr. Hart's office.

Q. I am going to show you a copy of the teletype, and it will appear on page 4, the middle of the page, and ask if you recall that teletype as being one you sent to Mr. Hart?

A. Which one is that?

Q. The one in the middle of the page.

A. August 15. Yes, sir.

Q. Yes, that teletype reads: [345]

“Mark Hart, August 15.”

When had you returned from New York?

A. I believe I arrived in Oakland on the 14th.

Q. “Mark Hart, August 15, '51.

“Cannot Give You Decent Deposit Until Thursday A.M. Working To Collect All I Possibly Can And Will Make Daily Deposits To A F And C Account Is This Satisfactory. Will Wait Reply
Ralph Smead”

(Testimony of Ralph L. Smead.)

Was that sent in response to a telephone call?

A. I am not positive, no.

Mr. Bronson: Whether it was or not, can't we have just a moment so we are together on this?

Mr. Garrison: Q. And did you receive numerous and frequent teletypes from him thereafter regarding collections and deposits?

A. From his office, yes, sir.

Q. And did these teletype messages, and phone calls occur almost daily? A. Yes, sir.

Q. Calling your attention to page 6, I ask you if you sent a teletype dated 8-30 to Mr. Mark Hart, reading:

"Have You Received Deposit Slip Covering Commission Check In The Amount Of \$4304.30 From Central Bank And Dated 8-14." [346]

"Answer: Yes We Have."

Did you see that one?

A. Yes, sir, I am reading it.

Q. Did you send that teletype?

A. Yes, sir.

Q. And following that there appears to be a teletype to you reading:

"What About \$30,000 Deposited 8-29

Min Okay

Min"

Then it says:

"Hope To Have Clearance On That For Deposit Your Account This Afternoon Or Tomorrow. Will Advise."

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. Were those teletypes sent on August 30?

A. Yes, sir.

Mr. Schimberg: That is the 29th, isn't it?

Mr. Garrison: No, that is the date of the deposit, the day before.

Mr. Schimberg: I beg your pardon.

Mr. Garrison: Q. Following there is a teletype message reading:

"How About Funds Of \$1450. Which You Received Last Friday. Also Has Check Of \$30,000 Actually Been Deposited At Bank AFC Account."

Was that teletype sent to you?

A. Yes, sir.

Q. And did you answer that teletype?

A. Yes, sir.

Q. And will you read the answer?

A. "Answer To Both Questions Checks Are All Payable To Mid-States Insurance Company Awaiting Authorization Required To Deposit We Are Advised By That Company That Authorization Has Been Forwarded To Us That Is The Only Hold Up But Has Been Definitely Cleared After Your Telephone Conversation Yesterday With Smith Everything Is Much Better"

Q. Now, did you talk to Mr. Hart about his telephone call to Mr. Smith?

A. I don't recall it.

Q. Now, what checks are you talking about here made payable to Mid-States?

A. Public Service.

Q. By the way, I believe there was a change in

(Testimony of Ralph L. Smead.)

the method of drafting those checks, wasn't there, after the first one was drawn?

A. By Public Service?

Q. Yes.

A. I don't recall whether it was after the first one or not. I don't believe it was the first check, but I recall that there [348] was a large check for some \$67,000, I believe it was, that was drawn payable to Joe Lotz. The check was deposited by Mr. Lotz and a stop-payment was issued by Public Service. The check was re-issued payable to Mid-States Insurance Company.

Q. And were all the checks thereafter made payable to Mid-States Insurance Company?

A. Yes, sir.

Q. Those are the checks that were endorsed Joe Lotz and deposited that were involved in the litigation against the bank?

A. Yes, sir.

Q. Now, you say in your teletype here in response to the previous one: "Answer To Both Questions", that is the "both questions" appearing in the teletype just above. Would you read the following message that appears on that page?

A. "Understood Public Service Checks Were To Be Made Payable To Lotz. Has This Procedure Been Changed. First Check Payable To Mid-States However This Has Been Changed And If We Do Not Receive Authorization Right Away From Them We Can Have Re-Issued."

Q. Now, what checks were you talking about there?

A. Public Service.

(Testimony of Ralph L. Smead.)

Q. And who was that teletype from?

A. Well, this is from the American Plan office in New York.

Q. Who did, you had the conversation as initiated with Mark [349] Hart, wasn't it?

A. Yes, sir, it appears to be.

Q. He started the teletype exchange on the 30th of August? A. Yes, sir.

Q. And this is part of that series of exchanges?

A. Apparently, it appears to be the same date.

Q. Yes. Do you know how Mr. Hart understood that the Public Service checks were to be made payable to Mr. Lotz, had you told him that?

A. I can't recall it definitely.

Q. At any rate the first one was made payable to Lotz, and then Public Service changed their mind and made it payable to Mid-States?

A. I don't recall whether the first one was made payable to Lotz or not.

Q. Well, I mean the one, larger one.

A. I definitely recall that.

Q. I call your attention to the next teletype which appears the following day, August 30, and ask if you received the one appearing at the top of the page for that date?

A. That is August 31, is it, Mr. Garrison?

Q. August 31. A. Yes, sir.

Q. It reads: "Has Check For \$30,000 Been Deposited In AFC Account As Yet." [350]

What check was that?

A. Well, during the telephone conversations,

(Testimony of Ralph L. Smead.)

during this immediate period I had advised Mr. Hart that we were expecting approximately that amount from Public Service and as soon as we had received it, we would make a payment to him.

Q. Then in the next message it says that you were out and cannot be reached. I won't read this, the intermediate messages, Mr. Bronson, if it is all right.

And then on the same date, American Plan, 8-31, to, apparently your office: "Have You Heard From Mr. Lotz Or Mr. Smead Yet"

And your office replies:

"We Are Try To Get In Touch With Them Now Will Advise You Immediately"

And then the New York Party says:

"Too Late But Please Have Them Call Anyway"
You recall those teletypes?

A. I don't believe that I was in the office at that time, but I have read those teletypes.

Q. Did you see them after you came back to the office?
A. Yes, sir.

Q. Then on page 8 I notice a teletype from you to Mark Hart dated September 4:

"Deposited \$6480. Account Of American Fidelity And Casualty Co This Date." [351]

Did you send that one?
A. Yes, sir.

Q. Was it your practice to report to Mr. Hart every deposit made?

A. We were required to do that, yes, sir.

Q. And where had this \$6480.00 come from?

(Testimony of Ralph L. Smead.)

Mr. Bronson: Is that a teletype that you have?

Mr. Garrison: Yes, it is. You have the original.

Mr. Bronson: I have the original? I notice it isn't the same type as teletype.

Mr. Garrison: No, I believe this is the one you have the original of or——

A. I do not know, Mr. Garrison. Of course, the money was——

Mr. Garrison: Q. Excuse me.

A. (Continuing) ——probably transferred from Mr. Lotz' trustee account, but where the deposit originated from, I don't know.

Q. If you don't know, just say so. Were you actually depositing from his trustee account funds that were received as premiums from other companies besides Public Service? A. Yes, sir.

Q. Is it a fact that you were depositing all income from the Lotz agency during this period to the American Fidelity and Casualty Company?

Mr. Bronson: That is a leading question. [352]

Mr. Schimberg: Adverse witness.

Mr. Bronson: I don't think he is an adverse witness.

Mr. Schimberg: Called as an adverse witness.

The Court: If he knows he may answer.

Mr. Bronson: Do they have the privilege of taking the witness and directing leading questions to him?

The Court: Leading questions are illegal under any circumstances.

Mr. Garrison: I assumed, this party being an

(Testimony of Ralph L. Smead.)

adverse party, a party defendant to the case, that I was permitted to cross examine him and I be permitted to indicate my questions.

The Court: Proceed.

Mr. Garrison: Q. Is it a fact that all funds received by Lotz during this period in his trustee account were paid in the American Fidelity and Casualty account?

Mr. Bronson: Same objection.

The Court: Overruled. If he knows he may answer.

A. I know that most all of the funds that were received by Lotz during that time were paid to the American Fidelity and Casualty Company. However, not the entire amount of the funds were.

Q. I see. Calling your attention to the teletype appearing on page 9, in the middle of the page, reading:

"Tomorrow Is Deadline With \$190,000 Unpaid"

The answer: [353]

"Be Home At Four O'clock Your Time"

You recall that teletype?

A. What is the date of that?

Q. Well, it is a part of a series.

A. 9-14?

Q. Begins at the top of the page. This is the third message—fourth message down. You see it here?

A. I was trying to.

The Court: What is the date?

The Witness: Appears to be dated American Plan NY 9-14.

(Testimony of Ralph L. Smead.)

Q. Reads to Ralph Smead from Mark Hart:
"What Is Amount Deposit Today."

"Minute OK Will Not Make Deposit Until
After Three Oclock Today Have Approx \$5000
Regular And Will Make Transfer From Other
Funds"

A. Yes, sir, I recall this message.

Q. What other funds did you mean when you
used that expression?

A. The "regular" meant funds received for reg-
ular American Fidelity and Casualty premiums.
Other funds would be from other companies.

Q. Public Service or anyone?

A. Public Service or anyone, yes, sir.

Q. And then the next teletype on the same series
reads:

"Tomorrow Is Deadline With \$190,000"

This is the September 14th. I understood you to
say that [354] you undertook to pay American Fi-
delity off entirely by the 15th of September, is that
right?

A. That's right, yes, sir.

Q. And this teletype refers to that deadline?

A. Yes, sir.

Q. And then you recall that teletype coming in?

A. Yes, sir.

Q. Now, the next one reads:

"American Plan New York"

This is apparently a call on the 17th from you to
Mark Hart.

"Mr. Hart Will Be Back In About An Hour.
May I Take A Message"

(Testimony of Ralph L. Smead.)

"Tell Him I Have Deposited \$8303.25 In The AFC Account Today And That Mr. Lotz Did Not Receive His Telegram Of Saturday Until Today Mr. Lotz Is Out Of Town See If There Is Any Message From Mr. Hart When He Gets Back"

And on the 17th, American Plan, New York, to Mr. Lotz—no, rather, reverse that, Mr. Lotz to American Plan:

"Is Mark Hart In, Please

"Min Please

"Yes Go Ahead"

And the message is:

"Mark You Mentioned The Other Day That You Were [355] Short A Couple Deposit Slips Which Ones Go Ahead"

And the reply comes back:

"One For \$15,000 One For \$7,867.35 And Of Course Todays"

Then, apparently, you replied:

"I Suppose You Received The One For Saturdays Deposit"

Mr. Bronson: Todays, isn't it?

Mr. Garrison: "I Suppose You Received The One For Saturdays Deposit", today, yes, you are right.

"Is This The One For \$60,800."

Apparently there is a typographical change there and the 8 has been changed, substituted 5.

"Go ahead.

"OK Received. Guess That Will Do It Will Send Others Out Right Away"

(Testimony of Ralph L. Smead.)

Q. Was the amount \$60,800, or was it some other amount in the original teletype?

A. Well, we made a large deposit to their account at approximately this time and it could be \$60,000 and some odd dollars.

Q. In other words, your best judgment would be the figure should be \$60,000 rather than \$60,800?

A. Well, I can't say that that figure should be that, but I do recall we did make a large deposit.

Q. Approximately \$60,000?

A. Sixty thousand dollars and that could well be intended to be that.

Q. Where had that money come from?

A. That money had come from Public Service.

Q. Now, then, on page 10 it says:

"American Plan: August commissions credited to your account \$6,692.00 making net balance due us through August 31st \$125,138.94, inclusive, of our \$50,000 loan, but not including expenses related to collection. We are considerably disturbed over your failure to live up to agreement to liquidate our balances by September 15th, particularly since American Fidelity auditors will be in October 1st for regular annual examination of our affairs as previously explained, they have no knowledge of this entire situation and we actually loaned you \$50,000 to keep this matter from them so as to avoid drastic action on their part. As you can perceive, I am unable to hold this after September 30th and therefore, urgently request that you take every necessary step to liquidate this balance, if possible, within

(Testimony of Ralph L. Smead.)

next five days. We have acted 100% in good faith and expect you to do likewise. (This message dictated go operator and signed by Mark M. Hart.) Please reply [357] immediately."

You recall that message coming in?

A. Yes, sir.

Q. On page 11, dated September 21, approximately 12:30 p.m.

"American Plan Operator: American Plan, New York. Go ahead please.

"Joe Lotz Operator: To Mark Hart from Joe Lotz and Ralph Smead. In reply to your teletype of this morning. Will have approximate deposit Monday of \$30,000. Working on loan for any balance. Will telephone you Monday morning. End or go ahead." Did you send that teletype?

A. Yes, sir.

Q. Now, is that the \$30,000 that was referred to a few days before in the teletype messages regarding a collection in that amount?

A. I don't believe it was, no, sir.

Q. Is this a second \$30,000 collection?

A. Well, actually, I don't believe we made, Mr. Garrison, these specific collections. But I would say this is definitely a second——

Q. Deposit?

A. Deposit that we were working on.

Q. In other words, you accumulated funds in the trustee account, did you, and then paid them into the A.F.C. account? [358] A. Yes, sir.

Q. Well, now, in this period of July, August

(Testimony of Ralph L. Smead.)

and September, did you pay Mid-States any money at all?

A. July and August and September?

Q. Yes.

A. I believe we made a small payment to Mid-States.

Q. \$2,800?

A. I believe that is the approximate amount, yes, sir.

Q. And that is all you paid Mid-States Insurance Company in those three months?

Mr. Bronson: Well, this is—I again object. I don't concede that this is an adverse witness at all, Your Honor, again having Mr. Garrison's testimony.

Mr. Garrison: This gentleman is a defendant in this case, if Your Honor please, and I have called him as such defendant and I am cross examining him and propose to follow the same procedure as you might cross examine any adverse witness.

The Court: Proceed.

Mr. Garrison: I have the rule, Federal rule here, Mr. Bronson, if you would like to read it, Mr. Schimberg has just advised me, and I will show it to you.

Mr. Bronson: I think counsel's position is highly technical. I will retreat into that position, Your Honor.

The Court: One comforting thing, the jury is absent. [359]

(Testimony of Ralph L. Smead.)

Mr. Bronson: I think there is a little rebuke in that.

Mr. Garrison: Q. Now, calling your attention to the teletype that was sent September 27, and also on page 12, this is a teletype apparently from you to Mr. Hart. It says:

"Can't get phone circuit to your office. It will not be necessary for you to call Smead in Santa Monica,"——

That is referring to your brother, I take it? Do you find where I read it? A. Yes, sir.

Q. Is that your brother?

A. May I read it?

(Witness reading document.)

Yes, sir.

Q. "Fund of his are being mailed to us today. We are making drive to see how much balance can be reduced by the first. Joe is working on loan now, should have some info today. Do you have any further instructions. Ralph Smead"

"GA", that means go ahead, does it?

A. Yes, sir. [360]

"Will teletype you tomorrow to get up to date story. As frankly, am deeply concerned about the attitude that will be assumed by the company if their auditors uncover the delinquency. Relying on you to do your utmost and to keep me posted every day by teletype. Hart."

Q. Did you reply to that teletype?

A. Yes, sir.

Q. And on Page 13 there is a teletype:

(Testimony of Ralph L. Smead.)

“American Plan Operator: To Ralph Smead from Mark Hart. This is our last working day of month, must have some definite and positive information your intentions or will be obliged to take drastic steps immediately. Hope this will be unnecessary. What is the score. Go ahead.”

Do you recall receiving that one, Page 13?

A. Yes, sir.

Q. And the reply from your operator is that you are out right now, and then the American Plan operator says—maybe I'd better read this:

“Joe Lotz: I am sorry, but Mr. Smead and Mr. Lotz are out right now. Will give them the message when they return.”

And the reply comes back:

“I think this is a stall and unless I hear [361] from Mr. Smead before tomorrow morning, will take necessary action including advices to insurance department and other local authorities, unless you can find Mr. Smead.”

Do you remember that?

A. Very definitely, yes, sir.

Q. Is that one of the teletypes you referred to when you referred to the pressure?

A. Yes, sir.

Q. Did you refer to that teletype?

A. Yes, sir, I did.

Q. Do you find it there on the same page, bottom of the page?

A. September 28, yes, sir.

Q. Would you read that?

(Testimony of Ralph L. Smead.)

A. "To Mark Hart from Ralph Smead: Mark, first, there is definitely no one stalling here. Mr. Lotz and I were at the bank working on loan when you called and it is felt that loan will be consummated shortly. Tex Smead is arriving here this afternoon via air with his money. We are trying hard to take care of you and don't think it will take much longer to clear things up. Go ahead."

Q. Mark Hart replies:

"Can appreciate you are trying, but you must [362] visualize my position. Cannot go along much further on promises of loan and of Smead paying over his money. There is still a large balance. However, we will hold off until we hear from you on Monday as to amount of deposit made. Incidentally, have you mailed deposit for \$15,955.59?"

Do you recall that?

A. Yes, sir.

Q. That teletype. Did you receive a teletype on the 16th of October from Mr. Hart appearing on Page 14 reading:

"Company auditors questioning balance. Imperative that you advise immediately."

A. Yes, sir.

Q. You apparently were out and said you would be back.

Now, on the 18th of October, I see a teletype, on Page 15, at the top of the page from John Ferguson. Do you know who he was—is?

A. Not of my own personal knowledge, no, sir.

Q. This teletype says:

(Testimony of Ralph L. Smead.)

“Examining books of American Plan on behalf of American Fidelity and Casualty and note substantial balance due from your office. Must have immediate expression as to your intentions. From John Ferguson, Auditor.”

Is that the only teletype you received from him?

A. I believe it is. In fact, I believe that is the first and only time I have ever heard his name.

Q. Now, did you receive a teletype on the 19th from—I believe it was a telegram—did you receive a telegram on the 23rd from Mr. Hart regarding balance? You will see the copy of the telegram on Page 16. This telegram reads:

“Ralph Smead, care Joe Lotz, 315 - 14th Street, Oakland, California:

“Company auditors inform me of their intention to come to Oakland next week unless minimum of \$40,000 is deposited no later than Friday. Mark M. Hart.”

Did you receive that wire?

A. Yes, sir.

Q. Now, on Page 17 there is a teletype dated the 23rd of October to Ralph Smead from Mark Hart, reading:

“Company auditor awaiting reply to wire this A.M. so as to determine whether or not trip to Oakland is necessary this weekend. What can you tell me definitely.

“Mark, we have definite arrangements for loan and will also have some additional money for you. Do not see any necessity for trip by auditors. Do

(Testimony of Ralph L. Smead.)

not think their trip would bring any faster results. I feel confident that the matter will be completely [364] cleared up in a very short time, believe me we are using all our efforts on this project. So I would not advise a trip by your auditors."

This is the reply:

"Have complete confidence you and Joe, but entire situation will pass from my control to Company auditor unless substantial deposit apart from loan is made by Friday. If you can send us a good sized deposit by Friday, I may be able to talk auditor out of going to Oakland and stirring up all kinds of trouble. This matter has reached a stage where company might take drastic action and of course, I am doing everything within my power to avoid same for Joe's sake."

And your reply:

"We appreciate your part, Mark, and believe me we will do our best."

And it says:

"According to my calculations, you should be collecting about \$100,000"——

Is that the correct figure? It is typed here in?

A. I see that it is corrected.

Mr. Bronson: The correction follows it.

Mr. Garrison: Q. (Reading)

"* * * this month. Am I right. Correct [365] \$100,000."

Did you receive those teletypes?

A. Yes, sir.

Q. Now, as I understand it, Mr. Hart had in-

(Testimony of Ralph L. Smead.)

structed you not to place any more business with the American Fidelity and Casualty Company, had he not? A. Yes, sir.

Q. And when did he do that?

A. While we were in New York Mr. Hart said definitely that we couldn't continue business with him.

Q. That was in August?

A. That was August 13.

Q. You are now at the end of October?

A. Yes, sir.

Q. These collections have all been made but no business had been written for American Fidelity and Casualty during that period?

A. I would say that during the period of after August 20 there were definitely no policies written with that Company.

Q. Now, I call your attention to a teletype on Page 18, which is dated October 24, Mr. Ralph Smead from Mr. Will.

"Balance due date \$66,010.07."

Do you see that?

A. Yes, sir.

Q. And was that the balance due AFC by that time, or [366] approximately?

A. Approximately that amount, yes, sir. This was October 24. Yes, sir.

Q. So that the 240 balance you referred to as existing in August had now been reduced by this method you described to \$66,000?

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. And then there is another reference to some detail in connection with the bookkeeping, and then:

“American Plan Operator: To Mr. Ralph Smead from Mr. Will.” is the next message following:

“Balance to date excluding today’s deposit regarding your teletype message is \$71,010.07. This, of course, includes September commission application and estimated legal and travel expenses in connection with trip to your office, but does not include return premiums since they are not properly includable.”

So that as of that date, we have approximately that amount as being agreed between you as the balance due, is that correct?

A. I don’t believe we ever agreed on the five thousand legal expenses, but the——

Q. The balance——

A. The balance of premiums is approximately right. [367]

Q. Legal and travel expense represents a charge made for Mr. Hart and Mr. Seller coming out here that time? A. Yes, sir.

The Court: We will take a recess.

(Whereupon a short recess was taken.)

(Whereupon, following the mid-morning recess, the witness Ralph L. Smead resumed the stand and testified further under direct examination by Mr. Garrison, as hereinafter indicated:)

Mr. Garrison: Q. Mr. Smead, I would like to

(Testimony of Ralph L. Smead.)

show you a series of checks which were introduced in this case marked Plaintiff's Exhibit No. 5.

Mr. Bronson: Will you tell us what it is, please?

Mr. Garrison: Sir?

Mr. Bronson: You are showing him an exhibit that is already in?

Mr. Garrison: Yes.

Mr. Bronson: Mr. McCallum's case?

Mr. Garrison: Yes.

Mr. Bronson: All right.

Mr. Garrison: Q. Ask you if you will look at those checks and see if you recognize them.

The Court: Any questions about these checks?

Mr. Bronson: No, Your Honor, they are in evidence already, Plaintiff's Exhibit 5, Mr. McCallum's case, the bank case.

Mr. Garrison: I want to ask him some questions about them when he——

Mr. Garrison: Q. You don't have to go over each one carefully, already have been identified, Mr. Smead, as being the checks that were paid by Public Service Insurance Company to the Mid-States Insurance Company on the dates they indicate?

A. There is one in here from a George R. Fulmore.

Q. Yes, with a Fulmore check added.

A. Also Jackson Motor Sales.

Q. Yes.

A. Yes, sir, I recognize——

Mr. Garrison: Incidentally, Your Honor, I no-

(Testimony of Ralph L. Smead.)

ticed that the photostat that has been introduced is a very poorly developed negative, and I am going to suggest to Counsel at the recess that we substitute—— [369]

The Court: Where was it prepared, in Chicago?

Mr. Garrison: No, I think it was photostated here.

The Court: All right.

Mr. Garrison: In California.

The Court: I think you are mistaken about that; we have very competent people here.

Mr. Garrison: Well, I am sure we have, and this apparently is the last run, and it wasn't expected to be used, apparently.

Mr. Bronson: If you want to substitute it, it is all right.

Mr. Garrison: I think after recess we can get together and put a more legible set of prints in so it will be easier for the Court to look at.

Mr. Garrison: Q. Now, then, these are the checks, Mr. Smead, that you received from the Public Service Insurance Company for the business that you have been referring to?

A. Yes, sir.

Q. And I show you also a series of checks and ask if you recognize those? A. Yes, sir.

Q. And were these checks as they appear drawn on the Lotz trustee account? A. Yes, sir.

Q. And all made payable to the American Fidelity and Casualty Company? [370]

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. In the amounts and on the dates that appear. I will ask these be received in evidence as a group.

Mr. Bronson: May I see them, please?

Mr. Garrison: As plaintiff's exhibit next in order.

Mr. Garrison: Q. Now, what was done with the checks you received from Public Service?

A. They were deposited in Mr. Lotz' trustee account.

Q. And what was done with the money after it was deposited in the trustee account?

A. Well, some of the money was transferred to Mr. Lotz' operating account. However, I believe that the major portion of it was paid to the American Fidelity and Casualty Company.

Q. I will show you one of these checks, being Public Service Check No. 3611, and ask on what day and what month and what day you received that check and on what day of the—and what month it was deposited in the trustee account?

A. This check is dated San Francisco, California, September 14, 1951, in the amount of \$67,500.00. There is a bank endorsement of September 18, 1951.

Q. I will show you a clearer print, if you can't read it.

A. This is the check that I told you about earlier that was originally paid to Joe Lotz, General Agent, I believe, was drafted to, and the check that was payable to Mr. Lotz was issued on Friday, and on

(Testimony of Ralph L. Smead.)

the following Monday the Public [371] Service issued a stop-payment and reissued the check, and that date might be the following Monday.

Q. So that the one I just handed you is the one, this is made payable to Mid-States Insurance Company?

A. Yes, sir, that one is, but there is one, the same amount payable to Joe Lotz.

Q. That payment was stopped, was it?

A. Yes, sir, and it was drawn on a Friday, as I recall, and deposited, and I believe the next day we wrote a check to the American Fidelity and Casualty Company.

Q. I see. Is that the—did I give you this?

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 19 admitted and filed in evidence, being the checks.

(Whereupon the Group of Checks, referred to above, were admitted into evidence and marked Plaintiff's Exhibit No. 19.)

Mr. Garrison: Q. I show you a check, No. 5011, drawn on the Joe Lotz trustee account. Is that the check you just have been referring to?

A. Well, no, sir, I was referring to a check in the amount of \$67,500.00 from Public Service payable to Joe Lotz.

Q. Yes, but then previously you referred to a payment to the American Fidelity by Joe Lotz in the sum of \$60,000.00. A. Yes, sir. [372]

Q. Now, tell us what that check is?

(Testimony of Ralph L. Smead.)

A. This check is in the amount of \$60,000.00, issued 9-15-51.

Q. That's the day following the Public Service deposit? A. Yes, sir.

Q. Do you know what balance there was in the Joe Lotz trustee account when the \$67,000.00 Public Service deposit was made?

A. Well, I recall that it was very, very low, recall that it was necessary that we have the \$67,000.00 check before we could pay Russell and Bond their ten per cent fee, which I think amounted to, oh, several thousand dollars, I forget the exact amount.

Q. So that you paid Russell and Bond their fee out of the very premium monies that you received from them?

A. I believe we did, yes, sir.

Q. Now, all of this Public Service business was put on the books of the Mid-States Insurance Company, is that correct?

A. The policies were written in Mid-States Insurance Company, yes, sir.

Q. And that total represented a liability of about \$150,000?

A. Between 130 and 150 thousand.

Q. Were the other payments that were made out of the trustee account to the American Fidelity and Casualty account made shortly after you received the Public Service monies?

A. Yes, sir.

Q. And those payments were the payments that

(Testimony of Ralph L. Smead.)

were made, that [373] were referred to in these teletype messages to Mr. Hart, were they, that I read you earlier?

A. They were some of those payments, yes, sir.

Q. Now, when did you have a conversation with Mr. Hart about what you were going to do, if anything, with this balance that was remaining after these transactions had occurred on the AFC of some sixty-one or seventy thousand dollars?

A. Yes, sir, after we had exhausted, I would say, the money that we had coming in from Public Service and had exhausted all of our other receivables, practically, there was a remaining balance which I discussed with Mr. Hart about cancelling that business of the American Fidelity and Casualty Company flat and rewriting it in the Mid-States Insurance Company.

Q. In other words, you were going to cancel flat enough American Fidelity business to offset this remaining balance of sixty-one or seventy thousand dollars?

A. Well, I believe it was the original plans to only cancel American Fidelity that was effective in September of 1951, or no later than August, but in order to cancel sufficient business to total sixty some odd thousand, it was necessary to go back into July.

Q. That wasn't business you had written for American Fidelity, was it?

A. That was business we had written in American Fidelity and Casualty. [374]

(Testimony of Ralph L. Smead.)

Q. In September?

A. Well, there was some business effective in September, yes, sir—no, sir, it wasn't business effective in September, it was August.

Q. August?

A. It was July and August.

Q. Your authority to write for American Fidelity and Casualty had been cut off August 13?

A. Yes, it certainly had.

Q. So that you are talking about the business that had been written the first thirteen days of August?

A. Although we might have represented to Mid-States Insurance Company that we were writing business in September, I remember that month mentioned at that time, it could be possible that we did represent there was policies effective in September, although actually I don't believe there were any.

Q. They were actually all policies that had been written prior?

A. Yes, sir, the later policies that were written.

Q. When did you have these conversations with Mr. Hart?

A. I believe these were in October or November of '51.

Q. Start out in the early part of October?

A. I believe it was, definitely in that period.

Q. Now, do you know what the balance due Mid-States was as of this date, October 1? [375]

A. The balance due Mid-States?

(Testimony of Ralph L. Smead.)

Q. Yes.

A. As of October 1? I believe we had about twenty some odd thousand dollars due, not including the Public Service business.

Q. The total balance due from Lotz to the Mid-States Insurance Company on October 1, do you know what that is? October 1?

A. That would include Public Service, plus their private writings. I would, as of October 1,—

Q. Would it refresh your recollection if I told you it was \$329,219.91?

A. As of October 1?

Q. Yes, sir, 1951. I don't mean the exact numbers, if you recall approximately.

A. I am trying to get the approximate amount—that is a very large sum. As of October 1, I could possibly account for two hundred thousand, or maybe a little more.

Q. Well, the figure is 329. Do you know what the balance owing American Fidelity was at that time?

Mr. Bronson: Did you hold up your hand?

Mr. Garrison: Well, the evidence will come in in due course, counsel.

Mr. Bronson: Coming in now.

Mr. Garrison: Correct, in the proper way.

The Court: They object to your testifying.

Mr. McKinnon: To distinguish from the evidence and [376] what counsel says, I find it is difficult.

The Court: Counsel's recital may go out.

Mr. Garrison: Yes, my recital may go out.

(Testimony of Ralph L. Smead.)

Q. Do you recall what the balance was due American Fidelity as of October 1?

A. I believe it would be around \$60,000.00, approximately.

Q. All right. You then discussed this flat cancellation of the American Fidelity and Casualty policies and the rewriting of them in the Mid-States? A. Yes, sir.

Q. And how was that accomplished?

A. You mean the mechanics?

Q. Yes, just tell us the mechanics of it.

A. Well, the business, as I stated, was originally written in American Fidelity and Casualty Company.

Q. Yes.

A. The policies of the American Fidelity and Casualty were cancelled by notice to the insured, with a statement that the policy was being cancelled flat and rewritten in the Mid-States Insurance Company.

We then wrote the policies in the Mid-States Insurance Company, using the same policy period, dates, and so forth, as the American Fidelity and Casualty Company.

Q. And did you cancel sufficient to wipe out the remaining balance of the American Fidelity and Casualty Company? [377]

A. Yes, sir, I think we tried to cover approximately the exact balance that we owed American Fidelity and Casualty Company.

(Testimony of Ralph L. Smead.)

Q. Now, I believe in the early stages of this plan you called Mr. Hatfield regarding it?

A. Yes, sir, I talked to him.

Q. Had a conversation with Mr. Hatfield, and what was that conversation?

A. Trying to recall whether it was accomplished by a telephone conversation, or whether it was only a telegram. The actual agreement on this rewrite was between Mr. Hatfield and Mr. Hart.

Q. But you did have some communication?

A. Yes, sir, I did have some communications. I recall the telegram definitely, telephone conversation with Mr. Hatfield, I also seem to recall that, but I am not definite. [378]

Q. You didn't, in any event, tell Mr. Hatfield anything about this campaign you had been carrying on for paying monies to American Fidelity and Casualty Company, did you? A. No, sir.

Q. You didn't tell him anything about your having paid the monies that you got from the Public Service Insurance deal to the American Fidelity and Casualty Company, did you?

A. No, sir.

Q. And you didn't tell them at that time that you had put business on their—committed them for business to the extent of \$329,000?

A. No, sir.

Q. And that you had paid the American Fidelity down from 240 to 56 thousand? A. No, sir.

Q. Had anyone from Mid-States visited your

(Testimony of Ralph L. Smead.)

office in this thirty or sixty day period when this campaign was going on?

A. You mean from the period of August 20——

Q. No, during September and October.

A. During September and October?

Q. Yes.

A. I believe that Mr. Kledzig was in our office once or twice during those months.

Q. You didn't disclose any of this to him?

A. No, sir. [379]

Q. Referring to this Public Service Business, did the pressure that Mr. Hart put on you, exemplified by these teletypes, influence you in taking that business and making that deal?

A. Yes, sir, very definitely.

Q. And how did that come about?

A. Well, that was the only possible way with the use of those fronts that we could—that was the only possible way that we could hope to liquidate their balance by the agreed date of September 15. We had to have a large block of business. The normal agency production certainly couldn't accomplish it within that time, or even within 90 days.

Q. Well, all right. Now, going on to this American Fidelity rewrite, do you know what your accounts receivable were as of that time?

A. As of the date we wrote——?

Q. October 1.

A. No, I don't, Mr. Garrison.

Q. Very well, we will establish that by other means.

(Testimony of Ralph L. Smead.)

How long a time did it take you to complete this transference of the liabilities from the American Fidelity over to the Mid-States Insurance Company?

A. Approximately two weeks, I would say; within two weeks.

Q. Were you in frequent communication with Mr. Hart during this time? [380]

A. Yes, sir.

Q. Did you have any pressure from him regarding completing that transaction?

A. I had teletype messages requesting amounts of cancellation tickets that had been completed from time to time.

Q. I would like to call your attention to a teletype message starting on Page 20, appearing on Page 20—or rather 19. Let us go back to 19.

At the top of the page there appears a teletype from American Plan, New York, Mark Hart—this is to Mark Hart from Ralph Smead, and this is dated October 31.

“Have telegram from Gerald Hatfield as follows: Are we to assume liability on policies rewritten from American Fidelity as of original effective date of American Fidelity policy. If so, what is earliest effective date also cannot allow fifteen per cent advance commission of this rewrite business. Please wire reply.”

Did you send that wire to Mr. Hart?

A. Well, this was a teletype message.

(Testimony of Ralph L. Smead.)

Q. Teletype, yes, excuse me. And received the reply:

"We were just calling you when your call came in."

And then he gives you a message, which is not particularly important. [381]

And then farther down, Mr. Hart to Mr. Ralph Smead:

"No wire from Hatfield. Did you wire him yesterday. Go ahead."

Answer:

"Yes, and I definitely asked him to wire you today."

"Okay, will wait wire, but if we can't clear this matter up by Friday, I will be in Oakland on Monday with Ferguson."

That is the same person, I take it, referred to in the earlier teletype? A. Apparently, yes.

Q. And did that have to do with the clearing of the rewrite with Mr. Hatfield working out the agreement and getting his consent to it?

A. Yes, sir.

Q. Calling your attention to a teletype of November 1 appearing on Page 20, the last one, this is from Hart to Smead, or from American Plan, New York, for Ralph Smead.

"Is Ralph Smead there?"

"I am sorry, but he just left to go to lunch. We expect him to return in about an hour."

"Tell Mr. Smead we have just received green light from Hatfield and he should start to process

(Testimony of Ralph L. Smead.)

any policy on which losses have not been recorded.
[382] Will contact Smead tomorrow with complete instructions. In interim tell him we would like to cancel seventy thousand of premium in order to clear entire matter. Believe the more cancelled the more advantageous to your office."

Now, that is the seventy thousand balance due American Fidelity?

A. That \$70,000 apparently included their estimated legal and travel expenses.

Q. That's the item that you never did agree to.

Mr. Garrison: Bear with me just one second, Your Honor.

Mr. Garrison: Q. Calling your attention to the teletype appearing on Page 23, this is apparently a continuation of one started on the previous page, dated November 8, and at about the middle of the page, New York says:

"That is right. So we will use ten or five day notices as cases might be and also have them stand losses on any rewrites."

"Just be sure to get us off legally and as fast as is humanly possible."

You recall that teletype from Mr. Hart?

A. I haven't——

Q. That is appearing in the middle of the page, 23, just above the paragraph break.

A. Yes. [383]

Q. You recall that?

A. Yes, sir, I recall it.

Q. Do you know what the necessity was for get-

(Testimony of Ralph L. Smead.)

ting that job completed as fast as humanly possible?

A. To complete the liquidation of American Plan's balances.

Q. And did you complete it?

A. Yes, sir.

Q. And thereafter American Plan had no balance due whatever?

A. Yes, sir, that is true.

Q. As a matter of fact, you did the job so well American Plan ended up owing Mr. Lotz money, did it not?

A. Well, I don't know whether it was as a result of this work. There would be normal cancellations that would produce credits to Mr. Lotz from time to time, but I am sure we cancelled sufficient business to liquidate his balance.

Q. And in the exact amount that Mr.—That Mr. Hart, the American Plan Corporation balance went down, Mid-States balance went up, didn't it?

A. Yes, sir.

Q. And the only prospect that you had for ultimately paying Mid-States balances at that time was out of your accounts receivable?

A. Would you mind——

Q. The only funds from which you had to pay Mid-States balance of 320 odd thousand at that October 1 date was out of [384] your accounts receivable?

A. Out of any accounts receivable, I don't know whose they were.

(Testimony of Ralph L. Smead.)

Q. Out of accounts receivable, that was the only source.

You had some correspondence and telephone calls with Mr. Hatfield shortly after this bunch of Public Service dailies arrived in his office, didn't you?

A. Yes, sir, there was correspondence on it.

Q. And shortly after that correspondence he came to Oakland, Mr. Hatfield?

A. I don't believe it was shortly after.

Q. Well, within the same month, the end of November?

A. I think the Public Service correspondence you mentioned was before November.

Q. Yes, but I mean after the correspondence you had with Mr. Hatfield and Mr. Lotz, Mr. Hatfield and Mr. Czar came to Oakland?

A. They came to Oakland in November, I believe.

Q. Latter part of November?

A. Yes, sir.

Q. And you met with them on a series of occasions?

A. Yes, sir.

Q. Do you recall when it was you first met them—with them?

A. The exact date I don't, no, sir.

Q. Sometime at the end of November? [385]

A. It was shortly after their arrival here.

Q. Do you know where you first saw them?

A. Well, I have met with them in several places, in the hotel at which they were staying, in Mr.

(Testimony of Ralph L. Smead.)

Lotz' office, Mr. Mead's office, but the first place of meeting I don't recall.

Q. You are not sure?

A. No, sir, I am not sure.

Q. And Mr. Mead was at that time representing Mr. Lotz, was he, as his attorney?

A. Yes, sir.

Q. Did he also represent you?

A. No, sir.

Q. He was attorney for the Lotz general agency?

A. Yes, sir.

Q. As such. Had he been collaborating with you on these transactions during the previous period?

A. I don't know, I don't—

Q. At any rate, he was present in the discussions with Mr. Hatfield and Mr. Czar and yourself?

A. He was present at times, yes, sir, but not on all occasions.

Q. There has been introduced here in evidence a letter, Plaintiff's Exhibit No. 6, dated November 27, signed by Joseph Peter Lotz, witnessed by William B. Mead and Ralph L. Smead. [386] Do you remember when that letter was—when you first saw that letter, if you have ever seen it?

The Court: November '51, wasn't it?

The Witness: The letter is dated November 27, 1951.

The Court: All right.

The Witness: I witnessed Mr. Lotz' signing of this document. However, at the time it had been

(Testimony of Ralph L. Smead.)

completed and I had not been present at the time it was drafted.

Q. Where did you witness his signature?

A. I first saw that letter in Mr. Lotz' office. I don't recall whether he signed it in his office or in Mr. Mead's office.

Q. Who showed you the letter?

A. Mr. Lotz.

Q. Who was present at that time?

A. I think only Mr. Lotz and myself.

Mr. Garrison: This is the letter, Your Honor, that reads—it is addressed to Gerald A. Hatfield.

“Dear Mr. Hatfield:

“I wish at this time, of my own free will and accord, to relate to you the facts and circumstances surrounding the financial difficulties in which I find myself today, and to explain to you in detail, to the best of my knowledge, how it happened.”

I won't read it all just now, just give you that much to [387] identify it.

And did he tell you who prepared the letter?

A. He told me that the letter was prepared—this was on a Monday morning, very early. I recall that I came to the office after a telephone call at my home from Mr. Lotz quite early on Monday morning, and he told me that he had been at the Leamington Hotel the day before, Sunday, most of the day and quite late during the night, and that they had agreed that, he had agreed with the officials of Mid-States——

Q. Meaning Mr. Hatfield?

(Testimony of Ralph L. Smead.)

A. I don't recall whether the name was mentioned or not, Mr. Garrison.

Q. Did you know Mr. Hatfield and Mr. Czar were out here then?

A. They were here at the time.

Q. Did you know it? A. Yes, sir.

Q. And Mr. Lotz had apparently been with them on the day before? A. Yes, sir.

Q. And what did you do with the letter when he handed it to you at the office?

A. I read the letter and also I believe there were other documents with it, and later on he signed it, I witnessed it.

Q. Well, later on you signed it at some other place, didn't [388] you?

A. I am not positive, Mr. Garrison, where he signed it.

Q. Did you talk with Mr. Mead at all about it at the time it was being signed? I notice his name appears on it.

A. I don't recall any specific discussions on it.

Q. Don't you remember Mr. Mead being present when you signed it, or your being present when he signed it?

A. If I could recall where it was signed—I can't—not clear exactly what the circumstances were.

Q. That is all right. If you don't recall, just say so.

Did the letter and its contents agree with the facts as you knew them at that time?

A. Well, I'm not too familiar with the words.

(Testimony of Ralph L. Smead.)

Mr. Bronson: Expect him to memorize every line?

Mr. Garrison: I mean at the time you signed, did you feel it reflected the facts as you knew them?

A. I am not positive.

Q. Now, then, what happened in the period at which time Mr. Hatfield was out here next in connection with your meetings with him?

A. Next—the next occurrence?

Q. Yes.

A. Well, I recall the execution of the—negotiation of some of these documents. I knew that, what the plan was, but what the order of events that happened, I wouldn't say. [389]

Q. That is the plan that is referred to in this letter that I just mentioned to His Honor?

A. Yes, sir.

Q. And your conversations, I take it, had to do with the plan of rehabilitating the agency at that time?

A. Yes, sir.

Q. Do you remember now after that, while that was going on, in the forepart of December—I think it was December 4—Mr. Hatfield and Mr. Lotz returned from San Francisco where Mr. Hatfield had had an appointment with the Insurance Commissioner, and having a conversation with both of them?

A. I do, yes, sir.

Q. And was that about December 4 to your recollection?

A. I believe it was, yes, sir.

Q. And where did you see them on that day?

(Testimony of Ralph L. Smead.)

A. Well, they came back to Mr. Lotz' office. Mr. Hatfield said that he had a conversation with Joe on his way to or from San Francisco, I don't recall which, and that Joe had told him several things about the knowledge of American Fidelity and Casualty and American Plan in the status of Lotz liquidating their accounts, and he talked about their conversation and he asked me what I knew about it.

Q. What did you tell him?

A. I told him that I was familiar with the occurrences.

Q. Did you explain what those occurrences were?

A. We had a discussion generally what took place, yes.

Q. Just the three of you?

A. I believe it was only the three of us.

Q. And did you tell them substantially what you have told His Honor here this morning about those transactions?

A. Well, I don't know whether it was as detailed or entirely that, but——

Q. Substantially?

A. But we did talk about what happened, yes, sir.

Q. Substantially the same as you told us today?

Mr. McKinnon: Well, if the Court please, there is no answer to that. Another instance of testimony from Counsel instead of the witness. Does the record show any answer to that, please?

The Court: There is no answer as yet.

Mr. McKinnon: All right.

(Testimony of Ralph L. Smead.)

The Witness: Well, as I say, we did definitely discuss the things that took place, what had happened on the rewriting of the Public Service business and the plans that had been entered into. Now this—I think we actually had two or possibly three conversations the same day, or the following day, covering the same subject.

Mr. Garrison: Q. In other words——

A. Of course we talked about different phases of it at the different times. [391]

Q. What did Mr. Hatfield say?

A. Well, Mr. Hatfield said that certainly the information or discussion put a new light on his problems, that he would like to have a statement, and said that he was going to contact Mr. Titus and advise him of what had happened and await his instructions.

Q. Did he make any request of you?

A. He requested that—complete a statement for him giving him some details in writing.

Q. Did you do that? A. Yes, sir.

Q. And I show you Plaintiff's Exhibit 11, which appears to be a ten page handwritten statement, and ask you if that is the statement you wrote out at that time?

A. Are we still talking about December 4, Mr. Garrison?

Q. Well, whatever date it was.

A. Which I believe was completed on December 5, at night, and possibly the 6th.

This statement was given by me; yes, sir.

(Testimony of Ralph L. Smead.)

Q. Now, that is the statement that you prepared at Mr. Hatfield's request? A. Yes, sir.

Mr. Garrison: Your Honor will stop me whenever the time is ready.

The Court: Take a recess.

(Whereupon an adjournment was taken until the hour of 2:00 o'clock p.m., this date.) [392]

Mr. Garrison: Mr. Smead, will you come forward, please?

RALPH L. SMEAD

one of the defendants herein, recalled as an adverse witness on behalf of the plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, having been previously sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as hereinafter indicated:

Direct Examination—(Continued)

Mr. Garrison: Will you read the last question, please?

(Last question and answer read by the Reporter.)

Mr. Garrison: Q. Where were you when you wrote this statement out?

A. In Mr. Lotz' office.

Q. What floor? A. First floor.

Q. And it took you several hours, I believe, you said to write it?

A. I think we worked on it several hours, yes, sir.

(Testimony of Ralph L. Smead.)

Q. And you finished it sometime after midnight?

A. Yes, I believe it was finished after midnight, I am sure it was. [393]

Q. That would be on the 6th of December?

A. Yes, the same day the statement is dated.

Q. What did you do with it after it was finished?

A. I gave it to Mr. Hatfield.

Q. That same—at that same time?

A. Yes, sir.

Q. And when did you next see it in connection with Mr. Hatfield and in any other person?

A. Well, it would be the night of the 6th, I believe it was, in Mr. Mead's office.

Q. Who was present?

A. Mr. Titus, Mr. Hatfield, Mr. Mead, Mr. Joe and Jack Lotz.

Q. Jack Lotz being whom?

A. Mr. Joe Lotz' son.

And I believe there was an attorney with Mr. Titus and Mr. Hatfield at the time. I don't recall his name.

Q. One from Chicago, Mr. Czar?

A. No, I don't believe it was Mr. Czar. I think it was a local attorney.

Q. And what was said pertaining to this document by any of the parties, and what did they say?

A. Well, we talked about the statement in general. We talked about, I believe, some teletype messages that were there—that we had there that night.

Q. From whom? [394]

(Testimony of Ralph L. Smead.)

A. From the American Plan, between the American Plan and Mr. Lotz' office.

Q. In connection with some of the transactions that were referred to in the document?

A. As I recall that was time, yes, sir.

Q. Well, what did any of the parties say, if you can remember, the substance?

A. Well, I recall the conversation, Mr. Garrison——

Q. Well——

A. Of course, everybody talked. I believe one of the parties read the statement to the group, and that just about covers it.

Q. And was the document signed there that night?

A. It was signed that night, yes, sir.

Q. By yourself? A. Yes, sir.

Q. And whom else?

A. I believe Mr. Lotz also signed the statement.

Q. Was the notarial acknowledgment attached at the same time? A. Yes, sir.

Q. By Mr. Mead? A. Yes, sir.

Q. And how long did that meeting last?

A. M-m, I would say approximately one hour. I am not certain.

Q. And that was at what time? [395]

A. That was in the evening after—I think after eight o'clock.

Q. Now, referring to Plaintiff's Exhibit 13, which is a statement in green ink on yellow legal-

(Testimony of Ralph L. Smead.)

sized paper, dated 12-8-51, will you tell me what you know about that document?

A. I recall—without reading the entire thing—I recall writing this statement. I have to read to be familiar with the details.

Q. Can you identify that document, Mr. Smead?

A. Yes, sir.

Q. What is it?

A. It is a statement concerning the transaction involving the rewrite of the Public Service business into the Mid-States Insurance Company.

Q. When was that written?

A. This is dated the 8th, 1951. [396]

Q. And do you know who wrote it?

A. It is in my handwriting. I wrote it.

Q. Where was it written?

A. I don't know where that was written.

Mr. Bronson: Do you have copies of that, Mr. Garrison? We were never given that under our order, saw it for the first time in this proceeding. Probably an accident.

Mr. Garrison: Is that so?

Mr. Bronson: That is true.

Mr. Garrison: This was an exhibit in the bank case.

Mr. McKinnon: We weren't in the bank case, as pointed out this morning, not a party. I hasten to say I thought it was an accident. Merely inquired if you had copies.

Mr. Garrison: I assumed you had seen all the exhibits in the bank case.

(Testimony of Ralph L. Smead.)

Mr. McKinnon: No, we haven't.

Mr. Garrison: Q. However, can you identify any of the circumstances surrounding the preparation of this statement?

A. I can't recall where that statement was written.

Q. If you can't, it is perfectly all right. Just say so.

A. I certainly can identify the statement.

Q. I notice it is signed by Joe Lotz. Was that signature attached in your presence, do you recall?

A. I don't recall whether it was or not.

Q. I show you another statement, Plaintiff's Exhibit 12, and [397] ask you if you can identify that? A. Yes, sir.

Q. And when was that—tell me first what is that.

A. This is a statement dated December 7, 1951, and covering an additional fact that had come to my mind after the statement of December 6.

Q. Where was it prepared?

A. I believe this was prepared on the first floor of Mr. Lotz' office at 315 Fourteenth Street in Oakland.

Q. And was that the next day following the preparation of this Plaintiff's Exhibit 11, the ten-page statement?

A. I believe it was. It is dated the following day.

Q. Who was present?

A. I believe Mr. Titus and myself, and I don't know whether Mr. Lotz was there or not.

(Testimony of Ralph L. Smead.)

Mr. Garrison: I will read this statement, if the Court please.

"Since making my statement of December 6, 1951, a few additional items have come to my attention which I think I should state:

"1. While in New York in Mr. Hart's office Joe mentioned that he wanted to see Dick Cass and Hart said several times for Joe not to see Cass as he was afraid Cass might be friendly with someone at Mid-States and tell them what we intended to do. [398] Joe promised him he would not see Cass.

"During a telephone conversation with Mr. Hart in November after approx. \$60,000 premium volume of AFC policies had been cancelled and rewritten in Mid-States Insurance Co., Mr. Hart asked me to destroy any teletype messages that were sent during the course of liquidation that might be harmful to him."

Mr. Bronson: I am sure you read that before.

Mr. Garrison: I am not sure.

Q. Did you destroy any teletype messages in Mr. Lotz' office? A. Yes, sir.

Q. After the telephone call from Mr. Hart?

A. Yes, sir.

Q. You recall when it was you received that call from him?

A. It was in November of 1951.

Q. 1951? Now, I will show you another statement which was introduced in the bank case as Plaintiff's Exhibit 4, and ask if you can identify that. Can you tell us what that is?

(Testimony of Ralph L. Smead.)

A. I believe that is the statement that was prepared in your office.

Q. And do you recall about when it was?

A. It was approximately December 10, I would say, in the early part of December.

Q. And who was present? [399]

A. Mr. Lotz, yourself, your secretary. I believe Mr. Titus was present; I am not positive.

The Court: December of 1951?

Mr. Garrison: Yes, Your Honor.

The Witness: Yes. And myself.

Mr. Garrison: Q. All of these incidents occurred in '51.

Ask that this be—and it bears your signature, does it?

A. Yes, sir.

Mr. Garrison: Ask this be received in evidence as our exhibit next in order.

The Court: Admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 20 admitted and filed in evidence.

(Whereupon memorandum referred to above was received in evidence and marked Plaintiff's Exhibit No. 20.)

Mr. Garrison: Q. Now, was that the first occasion on which you had met me?

A. I believe it was.

Q. And do you remember the time of day you arrived in my office? A. No, sir, I don't.

Q. What occurred when you first arrived there

(Testimony of Ralph L. Smead.)

prior to the dictation or preparation of this statement?

A. Well, we discussed the statement, I believe, of December 6. [400]

Q. Did we have that statement then, your statement of December 6, with us?

A. I believe we did, yes, sir. We discussed the events involved in the affairs of Mr. Lotz, and then this statement was prepared.

Q. And by whom was it dictated?

A. By yourself.

Q. And do you remember, did you remain there while it was typed?

A. I don't believe we did, I don't recall.

Q. Did you come, return to the office after?

A. I don't recall when that statement was signed or where.

Q. Did you read it over before it was signed?

A. I believe so, yes, sir.

Mr. Garrison: I would like to read the statement, if I may, Your Honor.

"Memorandum.

"Re. Mid-States, American Fidelity and Public Service Insurance Company transactions.

"Mr. Lotz was first appointed General Agent by Mid-States Insurance Company on May 15, 1947. This relationship has continued until the present time, excepting that between December, 1950, and September, 1951, practically all of the business written by Mr. Lotz was placed with the American [401] Fidelity Insurance Company. The appoint-

(Testimony of Ralph L. Smead.)

ment by American Fidelity occurred approximately the 1st day of December, 1950, and at first a portion of the business written by Mr. Lotz was placed with that company, but shortly thereafter most of the writings were placed with American Fidelity. This resulted by insistence by Mr. Mark Hart, president of the American Fidelity, that most business be placed with their company.

"During this same period Mr. Lotz was the agent for several other companies for other lines, including Public Service Insurance Company, but the writings were small.

"When first appointed General Agent by Mid-States, Mr. Lotz opened a trustee account with Anglo Bank at its Oakland branch. Thereafter, in January or February of 1951, Mr. Lotz cancelled that account and transferred his trustee account to the Central Bank of Oakland and carried on his banking with that concern until August, 1951. At that time Mr. Lotz became dissatisfied with the Central Bank and cancelled that account and opened a new account with the Anglo Bank. In opening these accounts, Mr. Lotz did not exhibit the general agency agreement that he had with Mid-States and [402] was not called upon to furnish any information regarding the terms of that contract. During the first period of his banking arrangements with the Anglo, he received a large number of checks, and it is his opinion that possibly one out of twenty of these checks were made payable directly to Mid-States Insurance Company directly, the balance

(Testimony of Ralph L. Smead.)

being made payable to him as their general agent. During the second period in which Mr. Lotz had his account at the Anglo Bank there were a number of checks received, some of which were made payable to Joe Lotz, and others, principally those received from Public Service Insurance Company, were made payable directly to Mid-States.

"About July 14, 1951, the agency forwarded its check to American Fidelity in the sum of \$50,-301.88 in payment of April business. This check was returned by the bank not paid, although it was subsequently honored. Shortly after this date Mr. Hart requested financial statements from the agency and indicated interest in their financial condition.

"About July 1, 1951, the Lotz agency made arrangements with Public Service Insurance Company to acquire by reinsurance a block of Public Service business. This business was placed with the American [403] Fidelity, and the arrangement agreed upon was that 75 per cent of the premium would be paid by Public Service and 25 per cent by the agency. Public Service forwarded its check for its portion, but the agency was unable to meet its commitment and that amount remained unpaid. On August 6, 1951, Mr. Hart became insistent that a statement be furnished and demanded that Mr. Lotz and Mr. Smead come to New York not later than Monday, August 13, 1951.

"Conference was thereafter held August 13, 1951, between Mr. Hart, Mr. Feller, Mr. Sudekum, vice-president, Mr. Will, treasurer, Mr. Lotz and Mr.

(Testimony of Ralph L. Smead.)

Smead. At that time it was disclosed by Mr. Smead and Mr. Lotz that the agency was indebted to American Fidelity for approximately \$250,000, to Mid-States for \$29,000 and approximately \$10,000 to miscellaneous companies. They also stated that they had monies due them of about \$75,000 and some operating costs outstanding. At this time there was due American Fidelity \$6,600, representing their portion of the reinsurance from the Public Service deal dated back to July, 1951, and there would be due within a few days approximately \$66,000 representing May business. In this [404] conference Mr. Lotz and Mr. Smead were interrogated in great deal regarding the exact condition of their affairs, where the money had gone, and what prospects there were for ultimately meeting their obligations. At this time Mr. Smead stated that the only way they could meet their obligations would be by maintaining a large float liquidate balance. This procedure contemplated securing a new insurance company and using current premiums on new business written to liquidate the balance with the old company, in this case, American Fidelity. In this conference it was suggested that possibly Mid-States would be willing to take new business written by the Lotz agency, and it was agreed that Mr. Lotz would go to Chicago to ask Mid-States if they would take business written by Lotz. Telephone calls were placed by Mr. Lotz to Mr. Hatfield in Chicago, (Mid-States' vice-president). In placing these calls Mr. Hart directed that the calls be

(Testimony of Ralph L. Smead.)

placed station-to-station so that the place of origin would not be known in Chicago, and that Mr. Lotz be careful that it was not made known that he was with Mr. Hart or that he had discussed the matter with Mr. Hart. Mr. Hart stated to Mr. Lotz several times that he did not want Mid-States to know his [405] position in the matter; that he only wanted his account paid and he did not care how. He said that Mr. Lotz should tell Mr. Hatfield that he was looking for a better deal. Mr. Hart explained that in this way Hatfield would not be suspicious.

"In the conference referred to above Mr. Will asked what would happen if Mid-States statements were not paid and whether or not any recourse could be had against American Fidelity. Mr. Hart advised that he would worry about that when it developed.

"In the same conference it was agreed that Mr. Smead should return to Oakland to complete the audit on the May business, and it was Mr. Smead's opinion that approximately \$40,000 would be available for payment on the American Fidelity account. Mr. Hart's secretary made the arrangements for Mr. Lotz' airplane ticket to Chicago and also an exchange of tickets for Mr. Smead to return to San Francisco. At this time a special representative of American Plan by the name of Richard Cass was located in Chicago, and Mr. Cass was acquainted with Mr. Lotz inasmuch as he had formerly been employed by Mid-States. Mr. Hart told Mr. Lotz not to call on Mr. Cass because of the danger of

(Testimony of Ralph L. Smead.)

[406] Cass' disclosing to Mid-States the American Fidelity's part in the plans.

"Mr. Lotz had his appointment with Mr. Hatfield in Chicago, and Hatfield agreed to take business written by Lotz, provided it was clean business, no soldiers, and not sub-standard. Hatfield agreed to issue a new general agency contract with Lotz at this time and to permit a 15 per cent advance commission.

"On August 20, 1951, Mr. Hart and Mr. Feller arrived in Oakland and made a thorough check of the books of the agency. At this time the \$66,000 due for May business was still unpaid.

"Prior to Mr. Hart's arrival in San Francisco, Mr. Smead had a conference with Jim Russell and Mr. John Shea of the Public Service Insurance Company, wherein it was agreed that approximately \$150,000 of the business would be reinsured with one of the agency companies. At this time it was also agreed, although Mr. Smead cannot recall who made the suggestion, that the business would not be handled in the usual way, by the use of bordereaux covering all of the business of a given amount across the board, but the business would be handled on a pro rata basis and rewritten in the [407] new company. Mr. Smead reported this proposal to Mr. Lotz while he was in Chicago, and when Mr. Lotz returned the work was undertaken to cancel policies and rewrite in the name of Mid-States. Mr. Lotz failed to mention this deal in Chicago and knowledge of it was never had by Mid-

(Testimony of Ralph L. Smead.)

States. When Mr. Hart and Mr. Feller were here in Oakland they were advised of this proposal and of the fact that the premiums received for this business would be used to liquidate the balance due American Fidelity. Mr. Hart again cautioned Mr. Smead and Mr. Lotz not to allow Public Service or Mid-States to know that he had any part in the deal, and under no circumstances were they to mention his name. On August 20th, while Mr. Hart and Mr. Feller were in Oakland they agreed that the American Plan Corporation, the managers of the Fidelity Insurance Company, of which Mr. Hart is president, would advance \$50,000 on Mr. Lotz' behalf to the American Fidelity. This was intended to help take care of the statement due August 15th in the sum of \$66,000.

"In connection with the handling of the funds received on the Public Service deal, Mr. Hart instructed Mr. Smead and Mr. Lotz as follows:

"All funds received directly from Public Service [408] were to be first deposited in the Lotz trustee account, and thereafter withdrawals were to be made from that account and the monies deposited in an account with the Central Bank which was maintained by American Fidelity. All other monies received by Lotz from any other source, regardless of the person to whom they were to be paid or the account to be credited, were to be deposited in the American Fidelity account with the Central Bank.

"On August 21 and August 22, 1951, an agreement was drawn up by Mr. Hart and Mr. Feller

(Testimony of Ralph L. Smead.)

and signed by Mr. Lotz and Mr. Smead. This agreement is dated August 22. In addition to this, a letter was handed by Mr. Hart to Mr. Smead whereby he was to receive \$1000 for assistance requested in working out the liquidation of the American Fidelity account.

“The actual work of cancelling the Public Service policies and rewriting them in Mid-States was not started until the first week in September. During this period, and particularly while the policies were being written, Mr. Hart telephoned from New York almost daily, asking how long it was going to take and when he could expect the money. [409] During this time Mr. Hart was advised that there was a statement of approximately \$29,000 due Mid-States for June business, payable September 15, 1951. Mr. Hart instructed that this payment be made to Mid-States. The payment actually was not forwarded until October 15, 1951. When the checks were received from Public Service, Mr. Hart was advised over the telephone that they had been received, that they had been deposited in the trustee account and in turn withdrawn and deposited in the American Fidelity account. During this period of time Mr. Hart called daily from New York.

“The payments received and the other monies deposited in the American Fidelity account liquidated all of the balance due them except approximately \$71,000. This amount included not only premiums due them, but also traveling expenses in connection with the New York-Oakland trips and the remain-

(Testimony of Ralph L. Smead.)

ing balance of \$38,000 on the \$50,000 advance by the American Plan. This amount was taken care of by cancelling flat that amount of business and rewriting it in Mid-States. This was accomplished by dating the Mid-States policies back to date of inception. The effect of this was to remove that much business from the American Fidelity books and eliminate their [410] liabilities under the policies, and to credit the agency account with that much in premium. This transaction originated by suggestion from Mr. Hart, and Mr. Hart also suggested that Mr. Smead call Mr. Hatfield in Chicago to see if this arrangement could be worked out. Mr. Smead contacted Mr. Hatfield and presented the proposition. Mr. Hatfield said that he would advise later. In the meantime Mr. Hart called Mr. Smead, inquiring as to what was being done, and when told that no progress was being made, Mr. Hart telephoned Mr. Hatfield and discussed the arrangements which were agreed to by Mr. Hatfield, and also advised him that he would have to look to Lotz for the payment of premiums.

“Ralph L. Smead——”

Q. I notice, Mr. Smead, that on pages 3 and 4 there are a number of changes which have been made in ink by someone striking out the typewritten portions. Do you know who made those changes?

A. Well, it carries my initials, and I believe Mr. Lotz' initials.

Q. You remember when the changes were made in relation to when the document was signed?

(Testimony of Ralph L. Smead.)

A. The same time they were—it was signed, I believe. I [411] don't recall that place and time of signature.

Q. Now, as I understand it, some time after the American Fidelity account was completely paid out, you became an employee of the American Fidelity and Casualty Company, did you not, or the American Plan? A. 1951, yes, sir.

Q. What date?

A. In January, 1951—or 1952, excuse me.

Q. By whom were you employed?

A. By the American Plan Corporation.

Q. And how long were you employed by them?

A. Until October, 1953.

Q. And what was your position?

A. Well, in 1952, January, I was hired as a service representative to handle the business that had been written by Mr. Lotz and that was unexpired at that time, to handle the claims.

Q. Were you employed by them up to and through the bank case?

A. When was that, in 1950—? Yes, sir, I was employed at that time by American Plan.

Q. Going back I find a letter here I have overlooked. Will you look at that copy of the letter and see if you can identify that for me?

A. Yes, sir.

Q. And is this a copy of a letter that you sent to Mr. Hart under date of August 30, 1951? [412]

A. Excuse me—yes, sir.

Mr. Garrison: Ask this be received in evidence.

(Testimony of Ralph L. Smead.)

The Court: Admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 21 admitted and filed in evidence.

(Whereupon carbon copy of letter dated August 30, 1951 to Mr. Hart was received in evidence and marked Plaintiff's Exhibit No. 21.)

Mr. Garrison: So that we keep our orientation, Mr. Smead, having jumped away from August, 1951, the Public Service rewrite was going on at that time, was it not?

A. At what time is that?

Q. August, 1951.

A. Yes, sir, latter part of August, and September.

Mr. Garrison: I would like to read this letter, if I may, Your Honor.

"August 30, 1951

Airmail

"Mr. Mark M. Hart, President
American Plan Corporation
44 Wall Street
New York, N. Y.

"Dear Mark:

"Just thought I would pass along what we are doing to clear the American Fidelity and Casualty account and let you know that your instructions are being complied with fully. We are very confident [413] that the matter will be cleared per agreement, on or before September 15, 1951.

"We experienced a few obstacles with the Cen-

(Testimony of Ralph L. Smead.)

tral Bank, but since your conversation with Mr. Smith everything will work out okay.

"It is realized that deposits have been a little slow this week, but this is definitely due to the fact that this is just a wrong time of the month for collections. We have sent out our August billings and returns will come in on those next week. We hope to collect the major portion of that billing before September 10, 1951.

"Joe and I are going to Los Angeles Friday to see if we can't together with Mr. Smead and clear his account, so in closing, Mark, I repeat that Joe and I are most anxious to fulfill our agreement and you are receiving the utmost cooperation. I will keep you advised of our progress.

"Very truly yours,

Ralph L. Smead."

Q. I notice, Mr. Smead, in the letter that Mr. Hart handed the Central Bank that morning in the enclosed envelope, it is dated August 17, 1951,—what was the date when it was handed to you?

A. I believe it was August the 22nd. [414]

Q. And Mr. Hart was in New York on August 17, was he?

A. I think he was. I believe we had a teletype message from him on or about that date.

Q. I have one other document that I don't seem to see here, but with that exception, if I may refer to that some time later, I will finish my direct testimony.

(Testimony of Ralph L. Smead.)

Oh, yes, Mr. Schimberg has called my attention to a teletype that I was looking for. I would like to ask you, Mr. Smead, referring to page 8—Mr. Bronson, of these, page 8—if you will look at the message dated September 6 and see if those messages were received and sent by you on the dates indicated?

A. The first messages? Which message?

Q. The second message at the top of the page.

A. Well, this teletype message dated September 6, 1951, was received.

Q. I see.

A. From the American Plan.

Q. Will you read that message?

A. "September 6, 1951 Joe Lotz operator, Joe Lotz Oakland——"

Q. I can't hear you.

A. (Continuing) ——"Joe Lotz operator, Joe Lotz, Oakland, American Plan operator. Would appreciate your advising address of Public reinsurance——"

well, wait, excuse—should be "Public Insurance Company. [415]

End."

"September 6, 1951——"

message continued on page 5——

"Joe Lotz operator. Address is 10 Drumm Street, San Francisco. Amount of morning deposit to American Fidelity and Casualty account \$1,718.75. Mr. Smead is in San Francisco now working on Public Service account. End. American Plan operator."

(Testimony of Ralph L. Smead.)

Q. That is the completion of that series of exchanges, is it?

A. Well, that particular message, yes, sir. Appears to be.

Q. And those messages were received and sent by you, were they? A. Yes, sir.

Q. I will show you a photostat of a statement which was introduced in the bank case as Plaintiff's Exhibit No. 3, and ask you if you recognize that? A. Yes, sir, I recall this.

Q. What is it?

A. A statement dated the 18th of December, 1951, and is additional information pertaining to Mr. Hart's visit in August of '51 at which book-keepers of Mr. Lotz were present are involved, and pertain to total accounts payable and total accounts receivable.

Q. Now, was this statement written out by you?

A. Yes, sir. [416]

Q. And do you know where you were when you wrote it?

A. I believe that statement was written on the first floor of Mr. Lotz' office. I believe it was written for, or in the presence of Mr. Titus.

Q. Being the only two persons present?

A. As far as I remember, yes.

Mr. Garrison: Ask this be received as Plaintiff's Exhibit next in order.

The Court: May be marked next in order.

The Clerk: Plaintiff's Exhibit 22 admitted and filed in evidence.

(Testimony of Ralph L. Smead.)

(Whereupon photostat of statement dated 12/18/51 was received in evidence and marked Plaintiff's Exhibit No. 22.)

Mr. Garrison: I would like to read this, if I may, into the record.

Mr. Bronson: 22?

Mr. Garrison: Yes.

"Joe Lotz——"

I can't read the writing.

"12/18/51

"During day of August 20th, 1951 while Mr. Mark Hart was in Joe Lotz' office I was asked to furnish him with the following information:

"Total prem. payable to co.'s. [417]

"Total receivables.

"I spoke with our bookkeeping department in the presence of:

"Mrs. Janice Howard.

"Miss Lyla Bowman.

"Miss Faye Roach.

"And a tape was run to furnish the above-requested information. To the best of my recollection the below figures are approximately correct:

"Total premiums payable \$287,000.

"Total receivables \$75,000.

"The following day, August 21st, 1951, I was asked to compile a listing by policy number, name of insured, amount of premiums, and by individual agents, the unpaid American Fidelity and Casualty Company accounts receivable. This information was compiled by Miss Roach and Miss Bowman of this

(Testimony of Ralph L. Smead.)

A. In the early part of September, I think the first week of September or thereabouts.

Q. Have you ever had any conversation with anyone from the Anglo Bank regarding Mr. Lotz' authority to endorse checks made payable to Mid-States Insurance Company? A. Yes, sir.

Q. Have you had more than one such conversation? A. Yes, sir.

Q. With whom and when did you have the first such conversation?

A. I had conversations with Mr. Roland and Mr. Prince. [420]

The Court: Fix the time.

The Witness: In the early part of September, the exact date I don't know. I had a conversation in person and also I had telephone conversations from those.

Mr. McCallum: Q. What was the subject and what was said during the first conversation?

Mr. Garrison: What year is this?

Mr. McCallum: I presume '51; am I right?

The Witness: 1951, yes, sir.

The Court: Do you recall the month?

The Witness: September, 1951.

Mr. McCallum: Q. He said the early part; is that correct, Mr. Smead?

A. Yes, sir, as I recall it.

Q. What was said?

A. The gentleman asked for, asked if Mr. Lotz had authority to deposit checks payable to insurance companies and I advised him that he did.

(Testimony of Ralph L. Smead.)

On, I believe, the second occasion, or on a different occasion, they asked that—asked where that was contained, and I said it was in his general agency agreement with his companies. They asked for copies, or the original contracts, which we promised to furnish—I believe Mr. Lotz was present at one or two of those conversations—which we did promise that we would furnish the bank. [421]

Then they had follow-ups on by telephone.

Q. How many follow-ups did you receive?

A. Oh, I would say at least two.

Q. Do you recall what was said?

A. They asked for the contract.

Q. And what did you say?

A. I told them on one occasion that—I believe it was while Mr. Lotz was out of town—that he would have to show them the contract on his return.

Q. What was said on the other occasions?

A. I believe that is the last conversation that I remember.

Q. Were there three, then, that you recall; three separate occasions?

A. There were three or more, yes, sir.

Q. And over what period of time did these conversations extend?

A. Oh, a period of probably three weeks.

Q. Commencing with the first part of September?

A. Still—. I would say from the, possibly, the tenth of September for a period of three weeks thereafter.

(Testimony of Ralph L. Smead.)

Q. Did you ever tell anyone at the Anglo Bank about the letters that had been introduced here as the Bank's exhibits, two, three and four?

A. No, sir.

Q. Did you ever tell anyone at the Anglo Bank that Mr. Lotz [422] had asked for authority and Mr. Hatfield had refused to give it to him?

A. No, sir.

Q. As General Manager, Mr. Smead, were the deposits by the Lotz Agency made under your supervision and control? A. Yes, sir.

Q. I show you what purports to be three photostats—four photostats, copies of deposits, ask if those are copies of deposits made by the Lotz Agency with the Anglo Bank?

A. Would you mind repeating the question?

Q. I say, do they represent copies or photostats of deposits slips of deposits made by the Lotz Agency with the Anglo Bank?

A. I don't believe this deposit slip originated from Mr. Lotz' office. The others represent deposits made by Mr. Lotz with the Anglo Bank.

Mr. McCallum: We offer, then, those that have been identified as having been made——

The Court: Be admitted and marked, with the exception of those two.

Mr. McCallum: That is the one.

The Clerk: These two right here.

Mr. McCallum: More than two. I think there are three.

(Testimony of Ralph L. Smead.)

The Clerk: Yes. Intervening Plaintiff's Exhibit 6 admitted and filed in evidence. [423]

(Whereupon four photostatic copies of deposit slips were admitted in evidence as Intervening Plaintiff's Exhibit No. 6.)

Mr. McCallum: Q. Was the checkbook of the Trustee account of the Lotz Agency which was held with the Anglo Bank maintained and kept under your supervision? A. Yes, sir.

Q. I show you what purports to be three photostatic copies of three of the pages and ask you if you can identify those as copies from the Joe Lotz checkbook of the Trustee account with the Anglo Bank? A. Yes, sir.

Mr. McCallum may these be marked, please, as the Plaintiff's Exhibit next in order?

The Court: Be admitted and marked next in order.

The Clerk: Intervening Plaintiff's Exhibit 7 admitted and filed in evidence.

(Whereupon photostatic copies of check stubs were received in evidence and marked Intervening Plaintiff's Exhibit No. 7.)

Mr. McCallum: Q. Now, Mr. Smead, directing your attention to the deposit slip that is dated September 7, and to the item marked "Russell and Bond, \$5,547.25," is that one of the checks that the Lotz Agency received from the Public Service transaction? [424]

A. I believe it was, yes, sir.

(Testimony of Ralph L. Smead.)

Q. And it was, of course, deposited in the Joe Lotz Trustee Account with the Anglo Bank?

A. Yes, sir.

Q. And that check, you recall to whose order that check was made payable?

A. I believe it was payable to, as far as I know, it was payable to Mid-States Insurance Company.

Q. Now, will you look at the check stubs, please, and find for me where that particular deposit appears to have been entered in the checkbook?

A. What is the date of the deposit?

Q. September 7, a gross amount of \$14,790.16.

A. It appears to be on this.

The Court: What is the answer?

The Witness: Appears right below Check 5006. It is written deposit 9-7-51.

Mr. McCallum: Q. Did you understand correctly, Mr. Smead, that on December 7, 1951, there was \$14,790.16 deposited in the Joe Lotz Trustee account with the Anglo Bank of which \$5,547.25 represented a check from the Public Service made payable to Mid-States?

A. Apparently is, yes, sir.

Q. Now, at the time that deposit was made, and looking again at the check stub, how much did Mr. Lotz have in the Trustee [425] account besides the sum represented by that deposit?

A. Well, he had \$1,846.02 less \$133.48.

Q. All right. Approximately \$1700 other than the deposit? A. Yes, sir.

Q. Now, will you look down further, please, and

(Testimony of Ralph L. Smead.)

tell us do you find a stub representing a check having been made payable to the American Fidelity?

A. Check No. 5009, amount of \$15,000.

Q. And the date of that check?

A. Well, it is a bit confusing; looks like 9-7, appears that the seven is marked through and made 9-11-51.

Q. I show you the other Plaintiff's Exhibit No. 19. Is the Check 5009?

A. 5009. Yes, sir.

Q. Now, from the actual check itself, can you tell me the date of the check?

A. The check is dated 9-7-51.

Q. In other words, does the check to the American Fidelity bear the same date then as the deposit was made?

A. Bears the date of 9-7-51, yes, sir.

Q. Now, directing your attention to the deposit slip dated September 14, and to the item \$67,500, does that represent the check received from the Public Service writings?

A. Yes, sir.

Q. And is that the check that was made payable to Joe Lotz? [426]

A. I don't know from this whether this is the one or not.

Q. Looking back at the next check stub, when do you find that the next check was made payable to the American Fidelity?

A. On September 15, 1951, Check for \$60,000.

(Testimony of Ralph L. Smead.)

Q. And what does the date of the deposit show by your check stubs?

A. September 14, 1951. [426-A]

Q. And how much money did Mr. Lotz have in the account other than what was deposited at the time the \$67,000 check was deposited?

A. This is on 9-15—9-14 a deposit of \$68,811.04.

Mr. Garrison: Don't all those figures appear from the record, Mr. McCallum?

Mr. McCallum: What figures?

Mr. Garrison: The question you just asked; it is in evidence.

Mr. McCallum: A little hard to decipher unless someone is familiar with the check book.

The Witness: I think possibly the best way to figure it out would be to read the withdrawals and deposits. At the top of the sheet there shows a figure as being on hand of \$15,703.47, a withdrawal of \$15,000. This is 9-7, apparently, deposit of 9-11-51 of \$1,062.64.

I see the balance here, leaves a balance of \$1,766.11; deposit of the 14th of September, \$4,951.98; a withdrawal 9-14-51 of \$1,056.94. So apparently at that time it was approximately \$6,000.

Q. Then also at the time, then, he drew the check to American Fidelity and Casualty for \$60,000 he had approximately \$6,000 of his own funds?

A. I don't know whether his own funds or not.

Q. Funds other than the \$67,500 check received from the Public [427] Service?

A. No, there was a deposit of \$68,000—\$68,811,

(Testimony of Ralph L. Smead.)

looks like four cents or 64 cents, in addition to the approximate figure that I gave before the withdrawal of \$60,000 on the next day.

Q. Can you tell us how much funds other than the sixty seven thousand from the Public Service he had in the account?

A. How much funds other than——?

Q. The \$67,500 from Public Service.

A. Well, it appears to be approximately \$67,500? I would say approximately seven or eight thousand dollars.

Q. At the time he drew the check for \$60,000 to American Fidelity? A. Yes, sir.

Q. Did you ever discuss with anyone from the American Fidelity as to what you were doing with the funds from the Public Service when they came in? A. Yes, sir.

Q. With whom did you have such a conversation? A. With Mr. Hart.

Q. When did that conversation take place?

A. The conversation took place during his visit of August 20, 195.

Q. What did he say?

A. And also I had conversations at later times on that. He instructed that the funds received from Public Service be [428] deposited in Mr. Lotz' trustee account, then withdrawn payable to American Fidelity and Casualty Company and deposited in the American Fidelity and Casualty account, Central Bank, in Oakland.

Mr. McCallum: Thank you.

(Testimony of Ralph L. Smead.)

The Court: Take a recess.

(Short recess.)

Mr. Bronson: Mr. Smead.

RALPH L. SMEAD

recalled to the stand as an adverse witness on behalf of the plaintiff, previously sworn.

Cross Examination

Mr. Bronson: Q. Mr. Smead, you were a witness in the proceeding that we have been calling the bank case here, were you not?

A. Yes, sir.

Q. Now, that was tried, I believe, in May of 1953, just a year ago?

A. I don't recall the date.

Q. All right.

The Court: Where was it tried?

Mr. Bronson: Right in this court before Judge Harris. I wasn't present, Your Honor.

The Court: What? [429]

Mr. Bronson: I wasn't present, but I have some——

The Court: Neither was I.

Mr. Bronson: Makes two of us.

Q. Then your deposition was taken in that case, Mr. Smead. I have the transcript of it here showing the date as April 1, 1952, about a year before the bank case went to trial; you recall that?

A. I recall the deposition, yes, sir.

Q. And a month after that deposition was taken

(Testimony of Ralph L. Smead.)

you appeared in a proceeding before the insurance commissioner that had for its purpose an examination of Joe Lotz on the conduct of his agency; you remember that?

A. That was in 1952, I believe, yes, sir.

Q. Yes. Now, in each of those proceedings you were sworn, were you not, to tell the truth before you testified?

A. Yes, sir.

Q. Not only in the deposition but in the trial and in the insurance commissioner hearing?

A. Right.

Q. You testified earlier in your examination by Mr. Garrison that when you went back to New York and arrived there on August 13 and went to the office of the American Plan in New York and met Mr. Hart, Mr. Sudekum, Mr. Will, and Mr. Feller, there, that they asked you certain questions about the debt or the amount owing by the Lotz agency to American Fidelity and [430] Casualty which you stated was about \$240,000, how much you owed to Mid-States, which you stated was about \$30,000, and to other companies which you said was between ten and twenty thousand, and that you then were asked what the receivables were of the agency and you stated it was \$75,000 approximately.

A. Yes, sir.

Q. I want to read now from testimony in the insurance commission proceeding which I'll ask you at the end of it if that was your testimony at that place. This took place between the dates of April

(Testimony of Ralph L. Smead.)

29, 30, May 1 and 2, all in 1952, and counsel, I am reading from page 263.

Mr. Garrison: I don't have a copy of the transcript, so the dates don't help me.

Mr. Bronson: Like to come up and observe?

Mr. Garrison: No, go ahead.

The Court: He is willing to trust you.

Mr. Bronson: That is nice, Judge; always nice.

Mr. Garrison: What is the page, counsel?

Mr. Bronson: Page 263 and page 264.

"Question: Is your memory good or bad on that?

"Answer: Well, I remember the discussion we had at that time. I think we owed the American Plan, or the American Fidelity and Casualty Company in premiums written approximately \$240,000, or thereabouts. That was the balance at that time to [431] date, with an estimation of how much business that had been written in the month of August to that time that would be due.

"Question: \$240,000?

"Answer: Approximately \$240,000. Now, we discussed with Mr.—well, with the gentlemen in the American Plan office, our accounts receivable on the American Fidelity and Casualty business judging from what we had written should almost cover that. We realize there was some shortage, although we didn't tell the people in the American Plan office that we thought there was probably \$30,000 difference in the amounts of our receivables and the amounts we owed them because Mr. Lotz and myself

(Testimony of Ralph L. Smead.)

knew that the situation could be taken care of. We discussed the possibility of obtaining a loan on our 20 per cent guaranteed commission.

“Question: How much was the loan or possibility of a loan?

“Answer: Well, at that time I believe we had two hundred and some odd thousand dollars unearned premium reserve, which 20 per cent of it equalled better than \$50,000, between fifty and sixty thousand dollars, and the American Plan people said, ‘Well, when you get back to the Coast see if [432] you can obtain a loan for that amount and we will guarantee that amount to your creditor and if you cannot get it maybe we can work out some advancement and loan it to you ourselves.’

“Question: Did you get that loan?

“Answer: We came back—I came back first to California, Mr. Lotz going to Chicago. I came back to California. Mr. Mead and myself attempted to obtain a loan under our contract, but it seems as though everyone we approached, and we approached a few banks, finance companies and individuals on the matter, that they didn’t understand the retrospective plan of operation. So therefore we were unable to get that loan, although it was guaranteed. So consequently the people from American Plan did loan toward our——

“Question: Indebtedness?

“Answer: Indebtedness of \$50,000.

“Question: Well now, you stated that there was approximately, according to your recollection and

(Testimony of Ralph L. Smead.)

best belief, \$240,000 due the American Fidelity and Casualty Company at the time you visited New York, so you have accounted for \$50,000. Now, where was the rest coming from?

“Answer: Well, we figured we had that at that [433] time in uncollected American Fidelity and Casualty premiums around \$200,000. As I explained, we had one very large agent in the Los Angeles territory that was quite a bit behind, and it was hurting our float proposition.

“Question: That was your brother, wasn’t it?

“Answer: That is right. It seems as though he was having collection problems himself, but that is what it amounted to, that we got behind on the float situation, that there was accounts receivable.”

Mr. Bronson: Q. You gave that testimony, did you not? A. Yes.

Q. And you represented to the insurance commissioner, who was the hearing officer there, under oath, that your receivables amounted to approximately \$200,000, not \$75,000?

A. I think, Mr. Bronson, that we based that figure on unearned premium reserves, as distinguished from uncollected premiums.

Q. Turning to the deposition in the bank case taken a month before the testimony I have just read—I am referring, counsel, to page 30 of the deposition in the bank case.

Mr. Bronson: This deposition appears, if the Court please, to have been taken by Mr. McCallum, and the questions that I am about—and the an-

(Testimony of Ralph L. Smead.)

swers I am about to read were under his examination. At the top of the page. That refers to the same [434] subject, the same incident in New York.

“Question: And you were asked some rather specific questions by Mr. Hart at that time, were you not?

“Answer: I think there were numerous questions, yes.

“Question: He asked you how much money was owed all companies?

“Answer: Well, I don’t know whether they did or not.

“Question: And you told him that there was approximately \$250,000 owed the American Plan and twenty nine thousand owed Mid-States and ten thousand to miscellaneous companies?

“Answer: I don’t know whether I did or not.

“Question: And he asked you the amount of the receivables and you said approximately seventy five thousand?

“Answer: I don’t recall that.

“Question: He asked you what had happened to the monies collected and you told him that they had gone out in advance commissions and operating costs.

“Answer: I don’t know about that.

“Question: Your answer is, I take it, that you don’t remember whether those questions were asked or [435] whether those answers were given?

“Answer: That is right.”

Q. Now, I will direct your attention, Mr. Smead, to the so-called station-to-station call put in from

(Testimony of Ralph L. Smead.)

New York to Chicago while you were in New York on the same occasion. I am reading from the last line on page 117 of the record of the trial of the bank case while Mr. Smead was on the stand under oath.

“The Court: Mr. Garrison, you asked to conclude our session at a quarter of four. I have one brief statement in clarification of this matter. On page 2 of the statement, Mr. Smead, there is set forth:—” and then a quotation.

“‘In placing these calls, Mr. Hart directed——”

By the way, I will interrupt myself a minute. That was one of the statements that you had signed that was being referred to there, do you recall that?

A. The statement station-to-station?

Q. Yes. A. Yes, sir, I do.

Mr. Bronson: This is a quotation from the statement.

“‘In placing these calls, Mr. Hart directed that the calls be placed station-to-station so that [436] the place of origin would not be known in Chicago, and that Mr. Lotz be careful that it was not made known that he was with Mr. Hart or that he had discussed the matter with Mr. Hart. Mr. Hart stated to Mr. Lotz several times that he did not want Mid-States to know his position in the matter; * * *’ May I ask you whether or not that is a true statement?

“The Witness: That is not.

“The Court: That is not a true statement?

“The Witness: No, sir. Your Honor, if I may

(Testimony of Ralph L. Smead.)

say something. I offered once with Mr. Garrison to go through these statements——

“Mr. Garrison: Just a moment, Mr. Smead, just a moment.

“Mr. McCallum: Let him answer the Court.

“Mr. Garrison: Yes, but he is making a statement, I couldn't hear what he is saying.

“The Witness: I said at one time I made the offer to go through the statements with you and correct the parts that were not true and to give you a statement if you wanted it, exactly what happened.”

Q. Did you give that testimony in the bank trial?

A. Yes, sir. And I say today that the statements are not entirely true, Mr. Bronson. [437]

Q. Yes?

A. They are not; there is parts of the statement that are not true.

Q. All right. I have difficulty finding just what the truth is as you understand it.

May I read from the same record at page 33—no, from the deposition, I should say, in the bank case, from page 33 on the subject of the so-called station-to-station call conversation. Line 8. Mr. Smead was under examination at page 33 by Mr. Garrison.

“Question: Do you recall stating to me at that time that when the telephone call was placed to Chicago from New York, to make the appointment for Mr. Lotz with the Mid-States officials, Mr. Hart

(Testimony of Ralph L. Smead.)

directed that the calls be placed station-to-station so that the place of origin would not be known in Chicago? "Answer: I do not.

"Question: And that Mr. Lotz be careful that it was not made known that he was with Mr. Hart or that he had discussed the matter with Mr. Hart?

"Answer: I do not."

A. Mr. Bronson, those are the same questions pertaining to the same statements which I say are not entirely true.

Mr. Garrison: What page is that, Mr. Bronson?

Mr. Bronson: That was on page 31, counsel—wait a minute, 33.

Q. In the deposition in the bank case at page 30, counsel, this has reference to some statement that you made in those December statements with regard to—page 31—with regard to a statement that Mr. Will is supposed to have made during the course of that meeting in New York in August, on the 13th day of August, 1951. The question in the deposition by Mr. Garrison:

"Do you recall Mr. Will participating in the conversation?

"Answer:" —by yourself— "Mr. Will made notes of the conversation.

"Question: Did he make any statements in the conversation?

"Answer: I don't recall any statements made by Mr. Will.

"Question: Do you recall Mr. Will asking Mr.

(Testimony of Ralph L. Smead.)

Hart 'what will happen if and when Mid-States statements cannot be met'?

"Answer: I don't recall that conversation.

"Question: And Mr. Hart said he would worry about that if it should develop.

"Answer: I don't recall that conversation."

A. The conversation certainly took place; very definitely. [439]

Mr. Bronson: Q. Well, the question I want to know, were you under oath when you made that statement?

A. Yes, sir.

Q. Just like you are today?

A. Yes, sir.

Q. Now, with regard to the incident regarding Mr. Cass—I am reading from the testimony in the bank trial, page 78. This will be a little longer—there are about three pages of this, Your Honor, and I think that it should all be read so that in fairness all the way around.

You know what I mean by the reference to Mr. Cass and the statements that you had given that Mr. Hart suggested that he do not see Mr. Lotz—don't see Mr. Cass?

A. Yes, sir.

Q. You have that in mind, have you?

A. Yes, sir.

Mr. Bronson: Bottom of the page 78.

"Question: I will show you what is marked Plaintiff's Exhibit No. 2 in Mr. Smead's deposition and I will read to you, very short, dated 12/7/51." This is the quotation, the statement of 12/7/51, in part as follows:

(Testimony of Ralph L. Smead.)

“‘Since making my statement of December 6, 1951, a few additional items have come to my attention which I think I should state: [440]

“‘1. While in New York, Mr. Hart’s office, Joe mentioned that he wanted to see Dick Cass and Hart said several times for Joe not to see Cass as he was afraid Cass might be friendly with someone at Mid-States and tell them what we intended to do. Joe promised him he would not see Cass.

“‘During a telephone conversation with Mr. Hart in November after approximately \$60,000 premium volume of AFC policies had been cancelled and rewritten in Mid-States Insurance Company, Mr. Hart asked me to destroy any teletype messages that were sent during the course of liquidation that might be harmful to him. Ralph L. Smead.’”

End of quotation.

“Did you write that out in longhand?

“Answer: Yes, I wrote that out, I think, Mr. Garrison.

“Question: Handed it to Mr. Titus, did you?

“Answer: Yes.

“Question: And was all that untrue when you wrote it out? “Answer: That——

“Question: Just answer the question. Was it untrue?

“Answer: Not all of the original statement; [441] there were certain small portions that might be true, but——

“Question: The majority of it was untrue?

(Testimony of Ralph L. Smead.)

“Answer: The majority was untrue and very definitely untrue. [441-A]

“The Court: The majority of this last supplement?

“The Witness: The original supplement of the original letter.

“Mr. Garrison: Question: Were you talking about the supplement?

“The Court: I think counsel directed his attention to the supplement.

“The Witness: There is—I don’t think that supplement is true either, from my recollection. That is something that Mr. Titus and I talked about, because he asked me the question if—he asked Joe if he saw Mr. Cass while he was in Chicago.

“Mr. Garrison: Did you fabricate all this conversation with Mr. Hart and make that up?

“Answer: Mr. Hatfield and myself did, yes.

“Question: Mr. Hatfield wasn’t present in New York, he didn’t know what Mr. Hart had said?

“Answer: That is true, he didn’t say what is in this——

“Question: Who suggested this conversation alluded to Mr. Hart about what he told Joe to do or not to do in Chicago about Mr. Cass; where did that all originate? [442]

“Answer: I don’t know, Mr. Garrison, originated between Mr. Hatfield and myself.

“Question: He wouldn’t have had any way of making that up, because you were present in New York when this meeting——

(Testimony of Ralph L. Smead.)

“Answer: That is true.”

and then another subject is taken up.

Q. Now, turning to the deposition, page 31, bottom of the page—now, wait a minute, I may be mistaken on my reference. This has reference to the circumstances of Lotz going to Chicago after the meeting of—

The Court: After the New York meeting?

Mr. Bronson: Yes.

“Question: Did Mr. Hart suggest to Mr. Lotz that he would go to Chicago and see Mid-States officials?

“Answer: I don’t recall whether it was Mr. Hart’s suggestion. I believe Mr. Lotz had plans to go to Mid-States Insurance Company.

“Question: Did Mr. Hart repeat several times to Mr. Lotz that he did not want anyone at Mid-States to know the American Fidelity’s position in the matter?

“Answer: I don’t recall that conversation.”

This has reference, if the Court please, to—and the [443] witness—to the testimony given today and the statements with regard to the deposition being made that was made on the Public Service deal through the trustee account, bottom of page 81 of the bank trial, when Mr. Smead was under examination, under oath, on cross examination:

“Question: Now, Mr. Smead, is it true or is it not true that Mr. Hart told you to deposit these Public Service funds first in the trustee account

(Testimony of Ralph L. Smead.)

and then in the American Fidelity and Casualty Company account at the Central Bank?

“Answer: It is untrue.

“Question: Did you make that all up when you told it to me in my office?

“Answer: Mr. Hatfield and I made up all the statements, Mr. Garrison.

“Question: Well, you didn’t say anything about that in the statement that you wrote out, that you first wrote, this is something that has developed since your first statement.

“Answer: I think it is in the original statement also.

“Question: ——”

By Mr. Garrison:

“It just doesn’t happen to be.

“But anyway, you did transfer the money [444] immediately out of the trustee account into the American Fidelity Account, didn’t you?

“Answer: We wrote a check.

“Question: Yes, sir.

“Answer: As that is a matter of record.

“Question: Yes, sir, it is a matter of record, and transferred there almost the same amount within the week, wasn’t it?

“Answer: I don’t know for sure, Mr. Garrison.

“The Court: Within the week of the 24th?

“Mr. Garrison: Well, within two or three days following, I don’t know just how close, but very close, and Mr. Smead knows all about it.

“Mr. Garrison: Question: And you are still

(Testimony of Ralph L. Smead.)

working for the American Plan and American Fidelity and Casualty?

“Answer: Employed by the American Plan Corporation.

“Question: Wholly owned subsidiary of American Fidelity and Casualty?

“Answer: I don’t know that, I don’t believe it is.

“Question: You testified to it earlier in the day.

“Mr. McCallum: I don’t recall he said wholly [445] owned subsidiary, Mr. Garrison.

“Mr. Garrison: Question: I think you said managers of the business.

“Answer: You as automobile managers under a management contract, but the financial relationship, I don’t believe they are owned by the American Fidelity.

“Question: I see. Your technicality is well taken.

“So I take it then, that—do I understand that Mr. Mead, Mr. Lotz’ attorney, was never present when any of these statements were given by you and Mr. Lotz in this connection?”

“Answer: We are talking about the original statements?

“Question: About your statements.

“Answer: I don’t recall whether he was in your office or not.

“Question: No, he wasn’t in my office. Well, he might have been, but was he present when any of the earlier statements were taken?

“Answer: Mr. Hatfield and I made this original statement up at night, wee hours of the morning.

(Testimony of Ralph L. Smead.)

“Question: I am not interested in that, my question is: [446]

“Was Mr. Mead ever present when any of the statements were taken?

“Answer: Besides these two, are there other statements?

“Question: Any statement.

“Answer: Not to my knowledge, no.

“Question: Your positive testimony he was not present?

“Answer: Well, I only know of this statement and one that was in your office.

“Question: And he wasn't present?

“Answer: He wasn't present at those two.

“Question: He did see this statement, however, when he acknowledged it as a notary, didn't he?

“Answer: I don't know whether he did or not.

“Question: Weren't you present when he acknowledged it? “Answer: Yes.

“Question: He had it in his hand, didn't he read it over?

“Answer: I am not sure whether he did or not.

“Question: You mean that Mr. Mead would let Mr. Lotz, his client, sign something of this importance, ten pages handwritten, and not read it?

“Mr. McCallum: Objected to as calling for his [447] opinion.

“The Court: Sustained.

“Mr. Garrison: Question: And can you tell us you don't know whether he read it or not?

“Answer: I don't know, no.

(Testimony of Ralph L. Smead.)

“Question: Don’t you know as a matter of fact that there was a very great discussion with Mr. Mead about this statement?

“Answer: There was a discussion in his office about the statement.

“Question: Well, did he know that this was fabricated? “Answer: He did not——

“Question: And made out of whole cloth?

“Answer: I don’t know how far we went through the statements, I recall that he witnessed the signature.

“Question: Did he know that it was all a fabricated pack of lies?

“Answer: I didn’t tell him that until some time later.

“Question: At the time you didn’t tell him?

“Answer: That’s right.

“Question: You knew that I was representing Mid-States and Mr. Hatfield, didn’t you? [448]

“Answer: Yes, I did.

“Question: Why didn’t you tell me it was all fabricated and made up?

“Answer: Because I didn’t know your designs or purpose, Mr. Garrison.

“Question: You didn’t, huh?

“Answer: No.

“Question: Did you suspect they were the same as yours?

“Answer: I didn’t have any except to assist Mr. Hatfield.

“Question: I see. I think that is all.”

(Testimony of Ralph L. Smead.)

Q. Now, taking that statement of December 6, the first and longest, the ten-page one that went into the wee, small hours, there was drinking going on during that period, wasn't there?

A. I don't know, what——

Q. As you have sworn on other occasions—I beg your pardon?

A. What do you call drinking?

Q. Intoxicating liquor.

A. Yes, there were approximately two, I don't think more, beers consumed. There was, however, drinking involved.

Mr. Bronson: That is all, Your Honor.

Mr. Kakures: No questions, Your Honor.

Mr. Garrison: Can I see that transcript? [449]

Mr. Bronson: You mean the insurance——

Mr. Garrison: No.

Mr. Bronson: I will give you all of these; I may have left some of the markers out.

Mr. Garrison: Your Honor, I haven't had a chance to find my places in this transcript of the trial; I didn't have a copy of it. It is five minutes to four; would it be out of order if I suggested——

Mr. Bronson: Quite agreeable to me.

The Court: After you look at that clock it is a clear indication to me what you want.

Mr. Garrison: Not as lazy as I appear, but I have a good excuse here anyway.

The Court: Very well, take the adjournment until ten o'clock.

(Whereupon an adjournment was taken until
Friday, May 7, 1954 at 10:00 o'clock a.m.)

The Clerk: Mid-States Insurance Company versus American Fidelity and Casualty Company, further trial.

Mr. Garrison: Ready.

Mr. Bronson: Ready, Your Honor.

The Court: Proceed. Take the stand, please.
Let's proceed in this case.

The Clerk: Ralph L. Smead to the stand, heretofore sworn.

RALPH L. SMEAD

one of the defendants herein, recalled as an adverse witness on behalf of the plaintiff herein, under Rule 43(b) of the Federal Rules of Civil Procedure, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as herein-after indicated:

Mr. Garrison: I have no questions of Mr. Smead myself, Your Honor please.

The Court: Any further questions, Gentlemen?

Mr. Garrison: Unless Mr. Smead has some comment he wishes to make.

The Witness: If I might.

Mr. Bronson: I think that is a little irregular, if I [451] may say so. This is a civil proceeding between certain parties—Oh, I beg Your Honor's pardon, he appears pro per; I had forgotten that, Judge.

Cross Examination—(Pro Persona)

Mr. Smead: If I might, I would like to comment

(Testimony of Ralph L. Smead.)

on the difference in some of the depositions and testimonies that I have given prior to this trial.

I think most of them are in connection with some written statements that I have given to, I think, both parties in this case, the Mid-States Insurance Company and the American Fidelity and Casualty Company.

I have said in different cases that parts of these statements are not true, and that is correct, very definitely. However, I think that the statements as written contains most of the facts that happened.

During the periods that these previous matters took place, the depositions and the other proceedings, I was employed with the American Plan Corporation. I was last employed as the Pacific Coast Manager of that Company.

I have talked on many occasions with Mr. Hart, who was President of the American Plan, pertaining to those statements. The first time, I believe, I talked to him was in December, shortly after the statements were given, by telephone, in New York. I talked with Mr. Hart in person. He came to [452] California in January of 1952, and he wanted to know specifically what was in the statements. I told him that the statements covered primarily what had happened in the liquidation of Mr. Lotz, including what had happened in our New York conference in our office.

Mr. Hart said that he was very concerned over the statements, and that if there was any proceedings ever negotiated against him that he couldn't

(Testimony of Ralph L. Smead.)

stand the statements, he would have to do something to refute them. He asked myself, Mr. Lotz, to come to San Francisco and give a statement in the office of Mr. McKinnon, Mr. Bronson. Pertaining to a new statement, he said that he definitely had to change the figures in the statements, the amounts payable or receivable, rather, by Mr. Lotz. I did not have copies of these statements that we referred to in my possession.

Mr. Hart said to me it was best that we try to forget the things that were contained in these statements, and that is what I have—what I was trying to do during these periods is to forget these things. I did not have any opportunities to review the statements in detail until within the last two weeks during this time.

The Court: Is that all you wish to say?

The Witness: I believe that about covers the statements, things that happened.

The Court: If I understand you, then, you admit yourself [453] you lied?

The Witness: Yes, sir. I tried to keep from bringing out the facts; I tried to answer a question, Your Honor, in a round-about way.

The Court: What prompted you to do that?

The Witness: Mr. Hart, Your Honor.

The Court: There must have been some other purpose in your misleading; he didn't force you to, did he?

The Witness: I guess not in that sense, but I was employed by him, Your Honor, I was working

(Testimony of Ralph L. Smead.)

for him. I had constant pressure on that subject. I tried not to lie, Your Honor, during these statements. I came up—I have been in the hospital since in February, I had six weeks, five, six weeks in the hospital, I gave this a lot of thought. I knew the matter was coming up this year. I tried to come up here this time, I wanted to present the facts as I knew them in full, I didn't want to hold back anything, regardless of what it might favor or who it might not favor. I was familiar with everything that happened in this proceeding that Mr. Lotz is involved in.

I think Mr. Lotz is a very fine man, I love him like a father. He is involved in something between two insurance companies, and that is what happened.

The Court: All right. Step down.

Mr. Bronson: May the witness remain there a moment, Your [454] Honor?

The Court: All right.

Mr. Garrison: Your Honor, if I could ask the witness one or two questions.

The Court: All right.

Redirect Examination

Mr. Garrison: Mr. Smead, you say that there are some respects in which the statements are not accurate? A. Yes, sir.

Q. Would it be difficult for you to point out to the Court which portions of the statements might be inaccurate?

(Testimony of Ralph L. Smead.)

A. No, sir, it wouldn't.

Q. Would you do it, please?

A. Yes, sir.

Q. So that there will not be any misunderstanding about it.

A. I have primary reference, Mr. Garrison, to the statement in your office, if I might have that one also.

Q. Oh, yes.

A. The first paragraph of this memorandum statement, which was taken in Mr. Garrison's office, pertains to the appointment of Mr. Lotz by American Fidelity and Casualty Company, and it reads, the latter portion:

"The appointment by American Fidelity occurred approximately the 1st day of December, 1950, and at [455] first a portion of the business written by Mr. Lotz was placed with that Company, but shortly thereafter most of the writings were placed with American Fidelity. This resulted by insistence by Mr. Mark Hart, President of the American Fidelity that most business be placed with their Company."

I recall that at no time Mr. Hart during that period insisting or demanding or in any other way trying to get more business in his Company. That portion of the statement I can't say is correct.

Q. Was that subject discussed after the document was prepared in my office?

A. I don't recall, Mr. Garrison, what might have prompted that portion of the statement.

(Testimony of Ralph L. Smead.)

Q. The statement got in there, but was it called to anyone's attention after it was dictated?

A. Apparently not.

Q. Any other portions?

A. Yes, sir, I believe there are, if I might review this.

(Witness reading to himself.)

The paragraph on the third page reads:

"On August 20, 1951, Mr. Hart and Mr. Feller arrived in Oakland and made a thorough check of the books of the Agency. At this time the \$66,000 [456] payment due for May business was still unpaid."

Mr. Hart and Mr. Feller at that time did not make a thorough examination of Mr. Lotz' books, to my knowledge.

Q. Was that inaccuracy referred to after the document was typed up?

A. Well, possibly there was a misinterpretation of what they actually did do.

Q. What did they actually do?

A. When Mr. Hart and Mr. Feller were here, they asked that we furnish them with a tape on the amounts that we had receivable and the amounts we owed.

Q. The difference you point out is they didn't——

A. They didn't actually check the books to my knowledge, no, sir.

On Page 4, there is a paragraph pertaining to the handling of funds received on the Public Service deal.

(Testimony of Ralph L. Smead.)

“* * * Mr. Hart instructed Mr. Smead and Mr. Lotz as follows:

“All funds received directly from Public Service were to be first deposited in the Lotz Trustee account, and thereafter withdrawals were to be made from that account and the monies deposited in an account with the Central Bank which was maintained by American Fidelity. All other monies received by Lotz from any other source, [457] regardless of the person to whom they were to be paid or the account to be credited, were to be deposited in the American Fidelity Account with the Central Bank.”

The last part of that statement I cannot recall Mr. Hart instructed all other monies to be deposited direct to the American Fidelity Account without first being deposited in Mr. Lotz' trustee account. I believe we did make some deposits of funds received by Mr. Lotz directly to that account without going through the normal Trustee account, but I cannot say that—excuse me—that Mr. Hart gave those specific instructions.

Q. Was that inaccuracy called to my attention after the document was prepared?

A. No, sir.

Q. It got in there.

A. It got in there.

Q. But no attention was called to it at the time?

A. Possibly it was another case of misinterpretation.

This paragraph that pertains to an agreement

(Testimony of Ralph L. Smead.)

that was handed to me, it says by Mr. Hart, actually I believe it was Mr. Feller that gave that, if it is of any importance, the party that actually did it, as I recall.

I think this completes this one. I remember reading this over carefully in my home not long ago, and I noticed at that [458] time, I think a couple of technicalities, but——

Q. Let me ask you, are the statements respecting the figures, the amounts due and the Public Service transactions and the American Fidelity re-writes, so-called, are those statements essentially correct? A. Yes, sir.

Q. And the other inaccuracies would be of the same type you referred to in the present statement?

A. Yes, sir.

Q. Mr. Smead, were you and Mr. Lotz represented at the time of the Insurance Commissioner's hearing?

A. Mr. Lotz—Yes, sir, Mr. Lotz and I were represented.

Q. Were you and Mr. Lotz represented at the time of the deposition that has been referred to here that was taken in the Bank case? I mean represented by Counsel?

A. I believe that we were represented. However, I don't recall that Counsel was present; I am not certain of that.

Q. Well, if I showed you the deposition that was taken in the Bank case, particularly Page 2 thereof,

(Testimony of Ralph L. Smead.)

would that refresh your recollection? At the top of the page.

A. This is the Anglo Bank deposition?

Q. Yes, sir. A. And this was——

Q. Of yourself.

A. In Mr. McCallum's office? [459]

Q. Yes, sir.

A. And this was taken in—on April 1, 1952. Yes, I recall, Mr. Garrison.

Q. Who represented you and Mr. Lotz at that time? A. Mr. Byron L. Dusky, of Oakland.

Q. And who paid his fee?

A. The American Plan Corporation.

Q. You were employed by the American Plan?

A. Yes, sir.

Mr. Garrison: That is all.

Mr. Bronson: Now, if the Court please, I have a few questions to ask Mr. Smead in view of this extraordinary situation here, but I would like the privilege of Court and Counsel of having my associate, Mr. McKinnon, examine him about a conversation that Mr. McKinnon had with Mr. Smead in Mr. McKinnon's office at which I was not present, and if we may have that privilege——

Mr. Garrison: No objection, of course.

Mr. Bronson: All right.

Recross Examination

Mr. Bronson: Q. Now, returning then to the last matter you spoke of first, as it comes on top

(Testimony of Ralph L. Smead.)

here, Mr. Dusky is a practicing attorney in Oakland, isn't he? A. Yes, sir. [460]

Q. Did you tell Mr. Dusky, your attorney, before you went to that deposition, at which he there represented you, that you were telling what somebody has called a pack of lies, what you call a pack of lies?

A. No, sir, not what I call a pack of lies, Mr. Bronson, that is not my term.

Q. I understand that, but—it was Mr. Garrison, that is right, but did you tell him that you proposed to go under oath over there and tell lies? Did you tell Mr. Dusky, the attorney?

A. I don't—I did not tell Mr. Dusky I proposed to tell lies, Mr. Bronson. I have not proposed to tell lies at that time in that sense; I tried to keep from disclosing information.

However, at the same time, I have tried not to lie.

Q. All I want to know is whether you told a practicing attorney and an officer of the court that what you were going to say in the deposition wasn't true before you went in there and told those things that were not true?

A. I have discussed the statements with Mr. Dusky, yes, sir, and the accuracy of the statements.

Q. You told him what you proposed to say on the subject of the statements in the deposition?

A. I don't think I told him what I proposed to say in those words, no, sir.

Q. All right. [461]

(Testimony of Ralph L. Smead.)

Well, now——

A. I mean, it was definitely understood, and it was a plan that the statements were to be gotten away from; that part is very true.

Q. Now, let me ask you about the proceedings in the Insurance Commissioner's office. That was a proceeding where they were examining the conduct of Joe Lotz Agency business on the question of whether they should or should not take away his license to act as a general agent, isn't that true?

A. That was the proceedings, yes, sir, by the Department; yes, sir.

Q. You weren't under the wraps of any attorney in that proceeding, were you, you personally?

A. What do you mean by that?

Q. Who represented Mr. Lotz in that proceeding?

A. Mr. Dusky, I believe.

Q. And you were sworn in that proceeding, were you not, to tell the truth?

A. Yes, sir.

Q. And then when you got around to the trial last year, again you were under oath, and gave all these statements?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. And, as a matter of fact in September or October of last [462] year, some months after the trial and before this trial came along, you were discharged from the employ of the American Plan, were you not?

A. Yes, sir. October 1, I believe it was.

Q. And it was not in connection with any illness, was it?

(Testimony of Ralph L. Smead.)

A. It was definitely not, to my knowledge.

Q. And they charged you with some misconduct in the conduct of their work?

A. No, sir, that is very untrue.

Q. That is not true?

A. That is very untrue, to my knowledge I have never been charged in connection with my job with the American Plan with any misconduct. Never.

As a matter of fact, the Vice-President that came here from New York could not talk long enough how sorry Mr. Hart, himself, and everybody else that they had to close the Oakland office, due to expenses that they couldn't afford it, and he talked about would I be interested in coming to New York and working there, going to some other territory and working. That was Mr. Clyde Cunningham, talked at great length.

Q. Let me ask you this: As I correct in understanding you, the suggestion of your testimony that you state to Judge Roche here this morning that you were under some pressures or influence from the American Plan in making the untrue statements that you did in the Insurance Commissioner's office and in the [463] deposition that was taken before the Bank trial and in the Bank trial itself before Judge Harris, is that what you are suggesting, under oath, that you were under some pressure or influence? A. Yes, sir.

Q. From the American Plan?

A. From Mr. Hart.

Q. Yes. A. To be specific.

(Testimony of Ralph L. Smead.)

Q. Now, you admit, do you not, that when you made those statements that you made on the various exhibits here, specifically December 6, 7, 8 and 18, that you were under some pressure then, too, weren't you?

A. Not the same type of pressure, Mr. Bronson, that was involved in these others. I will certainly say that.

Q. You react differently to one pressure than you do to another?

A. They are different types of pressure, yes, sir.

Q. Did you discuss with Mr. McKinnon when you came over to the office, the pressure you were put to at the time those statements were taken on the dates that I last mentioned?

A. I believe we did, yes, sir.

Mr. Bronson: That is all. [464]

Recross Examination—(Continued)

Mr. McKinnon: Q. You remember giving the deposition in the Bank case? A. Yes, sir.

Q. You remember coming to my office a little while after that deposition was taken?

A. This was what month, Mr.—April or May? I have been in your office on different occasions, I remember that.

Q. The deposition was taken on April 1, 1952. You want to look at that? Have you seen that?

A. I recall this deposition, yes, sir.

Q. Now, I put my question to you again: Do you remember coming to my office after this deposition was taken?

(Testimony of Ralph L. Smead.)

A. At what time, Mr. McKinnon?

Q. Anytime.

A. I have been in your office—I have been in your office I would say definitely after April 1, 1952, yes, sir.

Q. All right. You remember that I asked you this—you remember my saying to you, “I have read these statements that you gave in December, 1951, and I have now read, or heard all the testimony you gave in that deposition which conflicts.”

You remember my saying, “What happened; what is the truth in this matter?” Do you remember that?

A. Would you give it to me again, I don’t remember all of it. [465]

Mr. McKinnon: Mr. Reporter, would you read the question, please.

(Record read.)

A. Yes, sir, I do.

Mr. McKinnon: Q. All right. Then you remember replying to me substantially as follows: You first discussed the \$75,000 in receivables that are referred to in the statement as having been quoted in the August 13 conference in New York, and you remember telling me that it would have been impossible to compute those figures from the books in view of the state of the books at that time?

A. I remember that, I believe I remember that discussion, yes, sir.

Q. All right. Then do you remember discussing with me the December 6th statement, that is the

(Testimony of Ralph L. Smead.)

ten-page handwritten statement that you wrote and signed, was for that date, and do you remember telling me that the reason why that statement was written was that Mr. Hatfield got you drunk that night?

A. I don't remember saying, Mr. McKinnon, that Mr. Hatfield got me drunk.

Q. You don't? A. No.

Q. You remember telling me you were drunk that night?

A. No. I remember telling you that Mr. Hatfield and I had had a couple of beers during the course of the preparation of the [466] statement, but I don't remember the—that word, no, sir.

Q. Well now, look, we are not going to quarrel about words—you have been——

A. A couple of beers don't make me drunk.

Q. Just a moment. You have been discussing words all through your testimony in this case. I don't want to quarrel about words. The word "drunk" means intoxicated, and reciprocally if you have a third word for it, you may use it, but you wish to deny that you told me that on that occasion when you wrote that ten-page statement you were drunk, intoxicated, under the influence, or any other expression to indicate that state of mind?

A. Mr. McKinnon, I possibly told you, and I think I remember telling you, that Mr. Hatfield and I did have a couple of drinks, a couple of beers, but I cannot recall stating to you that I was intoxicated or drunk while the thing was being written.

(Testimony of Ralph L. Smead.)

Q. Well, I will refresh your recollection a little bit further. Do you remember telling me, "Mr. McKinnon, I am not a drinking man and the influence of the liquor on me that night was very marked."?

A. No, sir.

Q. You don't remember anything——

A. No, sir.

Q. ——to that effect? [467]

A. No, sir.

Q. Very well. Do you remember this: Now, remember carefully, do you remember telling me that you wrote the statement in your handwriting, but that it was dictated to you by Mr. Hatfield in the main, major portions of it were dictated to you by Mr. Hatfield? You remember that?

A. Yes, sir, I did.

Q. Now, do you remember telling me this: that on occasion you would say something was true, you put it down, and then when you put it down he would laugh and say, "That's a good one, isn't it"? You remember that?

A. That is an actual fact, Mr. McKinnon, the conditions are changed from that, if I might state it that——

Q. Quite changed since then?

A. I might say to you, Mr. McKinnon, too—Your Honor, may I?

Mr. McKinnon: Well, if it explains your answer; if you wish to go into something that isn't responsive to my questions, someone here, or you may on your own behalf, when I am through, go

(Testimony of Ralph L. Smead.)

into it. If you merely wish to explain your answer——

The Witness: No, sir, it is not.

Mr. McKinnon: You withhold your comment until I am finished.

Q. Do you recall Hatfield telling you that they had to get someone on something or that Joe Lotz would be out of business— [468] pardon me, I wish to strike that, Your Honor, because I omitted a phrase.

Do you remember telling me that Mr. Hatfield told you that they would have, either have to get something on someone or Joe Lotz would be out of business? A. Yes, sir.

Q. You remember telling me that at the time these statements were procured from you you received promises from representatives of Mid-States of your still having a job there if you would give the statements?

A. I recall telling you, Mr. McKinnon, that I at one time had received an application from the Mid-States Insurance Company for employment. That was in connection with the continuation of Mr. Lotz' business or the handling of the unexpired and remaining policies. I remember telling you that. I further remember telling you that I did not complete that application for employment. But I do not recall telling you that Mid-States Insurance Company told me that if I would give them the statements that I had a job with them. No, sir, I do not.

(Testimony of Ralph L. Smead.)

Q. You don't recall whether you did or not?

A. I don't recall telling you that.

Q. I understand. Now, let me put it further to you; you may have told me that, may you not?

A. I don't think I did, Mr. McKinnon.

Q. You are not sure? You want to go under oath and say you [469] didn't tell me that?

A. Well, the only thing that I can say that I remember talking to you, remember telling you about this Mid-States situation, that I definitely don't remember telling you that Mid-States Insurance Company had offered me employment if I would give the statements.

Q. Very well.

The Court: You were hopeful you would get employment—— The Witness: No, sir.

The Court: At any time?

The Witness: No, sir.

The Court: All right, proceed.

Mr. McKinnon: Q. Do you remember telling me that the things that were against the American Plan and American Fidelity in the statements you gave were dictated by Hatfield and that they were not true? You remember that?

A. I do, yes, sir.

Q. All right. You remember telling me that Mr. Hart did not engineer this deal?

A. Yes, sir, I did.

Q. All right. Do you remember discussing with me the question whether you acted as the representative of American Plan during the period imme-

(Testimony of Ralph L. Smead.)

diately following August 22 and until American Plan or American Fidelity had been paid; you remember that? [470]

A. May I have the question again?

Mr. McKinnon: Will you read the question?

(Record read.)

A. Yes, sir.

Q. You remember telling me you did not in fact act as their representative? A. Yes, sir.

Q. Do you remember telling me that the figures in the statement of December 18, 1951, could not have been gotten up or known at that time because the books did not reflect those figures at the time those things were happening? You remember that?

A. Mr. McKinnon, I remember the figures that Mr. Hart gave you at the time they were taking the statement. I believe Mr. Hart was dictating the statement in your office.

Q. I am not talking about that occasion. I am talking now about the occasion on which you visited my office which was shortly after the taking of the deposition, of your deposition in the bank case, and I asked you the question, which you doubtless remember. Will you now answer it? If you don't remember the question, we will put it to you again.

A. I don't remember discussing—yes, I do remember those figures, yes, sir.

Q. No, I didn't ask you for figures.

A. Discussing those figures with you. [471]

Q. Well I asked you a specific question and you

(Testimony of Ralph L. Smead.)

haven't yet answered it. I assure you it isn't very difficult.

A. May I have the question again?

Q. Yes, of course. I will put it to you again so the reporter won't have to go back among his notes.

Do you remember telling me in this conference between you and me that the figures contained in this statement of yours, which is dated December 18, 1951, could not have been gotten up or known then because at that time the books did not show those figures?

A. Mr. McKinnon, I told you that at one time; I don't remember when I told it to you.

Q. Very well.

A. I definitely told you—I gave you that statement.

Mr. McKinnon: That is all, Your Honor.

The Witness: I would like to, if I might, Your Honor, in connection with Mr. McKinnon's statements, make one statement pertaining to the statement that was dictated in his office in which Mr. Hart, Mr. McKinnon, myself, I believe Mr. Lotz, were present.

Mr. McKinnon: Pardon me, if the Court please. For clarification, I have not referred in my interrogation of this witness to a written——

The Witness: I am referring——

Mr. McKinnon: I know, to a written statement this witness [472] gave me. I want the Court to be clear he is talking about another thing.

The Witness: I am sorry if I brought in another

(Testimony of Ralph L. Smead.)

subject, but I intended to talk about these figures Mr. McKinnon has brought up.

Mr. Hart, before we went to Mr. McKinnon's office, said we cannot give Mr. McKinnon these figures. And at other times while Mr. Hart was here and at other times after Mr. Hart was here, he has told me that Mr. McKinnon would not represent him if he knew these facts.

Mr. Garrison: I have no questions.

The Court: Step down.

(Witness excused.)

Mr. Garrison: Call Mr. Horton.

E. W. HORTON

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Court: What is your name, please?

The Witness: E. W. Horton.

The Court: Where do you reside?

The Witness: In San Francisco.

The Court: Your business or occupation?

The Witness: I am a member of the firm of Lester, Herrick [473] and Herrick, certified public accountants.

The Court: How long have you been so engaged?

The Witness: With the present firm for nearly six years, and prior to that from 1925.

The Court: Here in San Francisco?

The Witness: No, sir, I was part of the time on

(Testimony of E. W. Horton.)

the East Coast of the United States, and part of the time in the Philippines and China.

The Court: Take the witness.

Direct Examination

Mr. Garrison: Q. And in what territories does the firm of Lester, Herrick and Herrick operate?

A. We operate principally on the West Coast of the United States. We have offices in Eureka, San Francisco and Los Angeles.

Q. You yourself are a certified public accountant? A. Yes, I am.

Q. Were you employed to make an audit of the books and records of the Lotz Insurance general agency? A. My firm was.

Q. When were they employed?

A. December, 1951.

Q. By whom?

Q. By Mid-States Insurance Company. [474]

Q. Did you make such an audit?

A. Yes, I supervised the examination.

Q. How many men did you have working under you? A. I think there were three.

Q. Where did you make the audit?

A. In Joe Lotz' office in Oakland.

Q. And did you commence at the time you were first employed? Was the audit started shortly after you were first employed?

A. Yes, very shortly after.

Q. As of what date?

A. May I ask what you mean as of——

(Testimony of E. W. Horton.)

Q. What date did you start the audit?

A. We started in December, 1951.

Q. December? A. December, 1951.

Q. Was Mr. Lotz there at that time occasionally?

A. He was there occasionally, yes.

Q. Did he cooperate with you in making available the books and records? A. Yes.

Q. Were officials of the Mid-States Insurance Company there?

A. They were there for a short time.

Q. And did they assist in making available the records? A. Yes.

Q. Did you find that all of the normal records that would be [475] kept in an office of this kind were present, at least as to the physical books?

A. The records were there, but they weren't in too good shape.

Q. Well, nothing had been removed as far as you could tell? A. No.

Q. And what was the condition of the accounts when you first went in there?

A. They weren't currently maintained, they hadn't posted up the general ledger accounts for several months when we were in there.

Q. Could you tell us just briefly some of the procedures involved in insurance bookkeeping in an operation of this kind?

A. Well, in insurance bookkeeping the primary function is to record the insurance written, amounts chargeable to the various sub-agents, and the collec-

(Testimony of E. W. Horton.)

tions of premiums and the remittance of those premiums to the various insurance companies.

Q. And what did you do with respect to the books and records in the Lotz office as a part of your audit?

A. Well, the first thing we did, we had to do a certain amount of bookkeeping work which I used one of our bookkeepers on to post up the records, as I recall, for the month of September, October and November, before we began our regular audit.

And then we followed the regular audit procedures by checking the bank accounts and taking off trial balances of the accounts receivable, amounts due from sub-agents, and trying to [476] confirm those balances, and trying to establish amounts due to the various insurance companies. And as a result of that it required considerable work to get up those figures.

Q. Were you able to complete the bookkeeping functions that you undertook?

A. Yes, we posted up the books through November, 1951.

Q. And in that work of making the audit were you able to determine the sources from which Mr. Lotz' income came?

A. We analyzed the collections to try to determine the sources from whom they received the monies.

Q. And how would you do that as a practical matter?

A. They had a collection sheet each day there

(Testimony of E. W. Horton.)

in which they would indicate from whom they collected the monies and for the account of what insurance company, and by that process we analyzed and tried to determine the premium collections as applicable to the various insurance companies.

Q. And then the premium income would be credited to the particular insurance company's account for whom the collection had been made?

A. Well, the premium collections, as a book-keeping application, would be first credited to the sub-agents' account. As far as funds deposited in the bank account, the funds would be withdrawn and paid to the insurance companies.

Q. I see, but his books reflected first the insurance company that the collection **had been made** for and that account [477] would show the amount collected?

A. They tried to show for whom the premium collections were for, yes.

Q. And then did you have access to the bank records?

A. Yes, we took the bank statements and checked the recorded receipts to the bank deposits shown on the bank statements.

Q. And did you check these collections back against the business that had been written in a particular company to see that they tallied?

A. As I stated, we analyzed the premium receipts and allocated those to the respective insurance companies applied.

(Testimony of E. W. Horton.)

Q. And his income was, for all practical purposes, premium income, wasn't it?

A. Well, commissions would be his income, but premiums would be credited to the sub-agents' account.

Q. That's accurate, yes, but the monies that he received in the first instance from the sub-agents was essentially premium income?

A. Premium income, that's right.

Q. Then did you—were you able to determine from the bank records and his bank books where the money went after it was deposited in different accounts?

A. We could check out the cash disbursements and tell to whom monies were paid.

Q. I see. And how many accounts did he have?

[478] A. What kind?

Q. Joe Lotz' bank accounts.

A. As I recall, he had a trustee account, he had two trustee accounts; one was at the Central Bank, which was discontinued, as I remember, in September, and opened up an account in the Anglo Bank in September. Then he had also an operating account.

Q. And you traced—you checked the disbursal of the funds in all those accounts, did you?

A. Yes, we did.

Q. Did you submit a written report of your audit?

A. Yes, we did.

Q. And you have been furnished a copy of that, counsel, and what is the date of your audit report?

(Testimony of E. W. Horton.)

You may look at any documents you have in there.

I will show you a copy and ask if that is a copy of your audit report. A. Yes, sir.

Mr. Garrison: Might I ask that this be received in evidence as Plaintiff's Exhibit next in order?

The Court: May be admitted and marked.

The Clerk: Plaintiff's Exhibit 23 admitted and filed in evidence.

(Whereupon Report of Examination December 1, '51 to September 30, '52 was received in evidence and marked Plaintiff's Exhibit No. 23.) [479]

Mr. Garrison: I think it might be helpful if I could pass this up to Your Honor, because I am going to ask him to identify some specific pages.

Q. You have your copy, Mr. Horton?

A. Yes, sir.

Q. And will you turn to page 13. This is entitled "Summary of Premiums Collected, Insurance Written, and Payments on Account for the Period December 1, 1950 to September 30, 1952".

Does this page contain a reflection of the total premium income in the Lotz' office and the payments by him to the different companies?

A. Page 13 applies primarily to the Mid-States Insurance Company and American Fidelity and Casualty Company.

Q. I wonder if you would, in layman's language, just explain for the benefit of His Honor and ourselves what this page 13 shows?

A. Page 13 attempted to show the volume of

(Testimony of E. W. Horton.)

business written by Joe Lotz Insurance Agency for the accounts of Mid-States Insurance Company, American Fidelity and Casualty, to show the premiums collected by that agency for each of those companies, the payments made to the various—to these insurance companies by Joe Lotz, and the balances due to these insurance companies at the dates shown hereon.

Q. Calling your attention to the right hand side of the page, that is the side showing the insurance written, premiums [480] collected, and payments on account of the American Fidelity and Casualty, is it not? A. That is correct.

Q. And the upper half of the page shows the months for the year 1951 and with December 1950 included? A. That's correct.

Q. And it appears under "Insurance Written" column, which is the fourth from the right hand side, that there was only business written in the American Fidelity for the period from January to August, is that correct?

A. No. September, I believe.

Q. Through August, or a total period of eight months? A. Oh, correct.

Q. So that I'm correct, then, am I?

A. Yes, sir.

Q. In saying American Fidelity only issued policies during those eight months?

A. That's correct.

Q. Through the Lotz office. Well now, how

(Testimony of E. W. Horton.)

much was owed the Mid-States Insurance Company by Lotz commencing in the year 1951?

A. At what date in '51, January?

Q. Yes.

A. January 31 we showed \$49,672 as due Mid-States Insurance Company by Joe Lotz. [481]

Q. And were those——

The Court: Pardon me, where is that?

(Witness indicating to the Court.)

Mr. Garrison: Q. I am talking about Mid-States Insurance Company.

The Court: January?

The Witness: January 31.

The Court: I see.

The Witness: There is the balance there.

The Court: I see.

Mr. Garrison: Q. And that was for business written in the year 1950?

A. That is \$49,672 represents the business written in the months of December and January—December 1950 and the month of January, 1951.

Q. And let us include the month of February. I notice you have those set apart at the top of the page. A. Up at the top of the page?

Q. Yes. A. Amount of \$18,464.51.

Q. Total? A. The total, \$62,128.72.

Q. Was that account paid by Lotz to the Mid-States?

A. That was the amount by Joe Lotz to Mid-States Insurance Company on the dates shown,

(Testimony of E. W. Horton.)

which wiped out the balance due [482] Mid-States by Joe Lotz at December 1, 1950.

Q. So I take it that your twelve months' tabulation here shows the two companies starting out on an equal basis?

A. Beginning with December, 1950.

Q. And you run that for a continuous twelve months' period, do you?

A. That is correct.

Q. Now, where do you show the total results of that twelve months' operation on this page 13?

A. Down here where you start with a total of \$317,000. [483]

The Court: Three hundred seventeen?

The Witness: Yes, sir.

Mr. Garrison: Slightly below the middle of the page.

The Court: Oh, I've got it.

Mr. Garrison: Q. And that is what?

A. That represents the premiums collected by Joe Lotz Insurance Company Agency allocated to the premiums for the account of Mid-States Insurance Company to that date.

Q. Now, that means those premiums were collected on policies actually issued by Mid-States?

A. That's correct.

Q. What is the next column?

A. The next column shows the total insurance written to that date of \$540,390.00.

Q. That is just for this twelve-months period, now?

(Testimony of E. W. Horton.)

A. The whole period, December, 1950 through November, 1951.

Q. Now, the next column.

A. Represents the amount paid to Joe Lotz on the insurance written from December, 1950 to November, 1951 of \$122,460.00.

Q. In other words, they wrote \$540,000 collected three hundred and seventeen, and Lotz paid Mid-States one twenty-two? A. That's correct.

Q. That is the round figures of it. Well, now, then let's see what happened to the American Fidelity during the same period. [484]

A. During the same period Joe Lotz collected for the account of American Fidelity and Casualty \$228,000.00.

Mr. Garrison: That is jumping over the Mid-States balance column.

The Court: Yes.

Mr. Garrison: Q. Collected 228 on business that had actually been written by American Fidelity?

A. That's right.

Q. Next column.

A. The next column shows the amount of insurance written during that period of \$255,239.00.

Q. What was paid on their account?

A. There was paid on the account \$231,274.00, and checks were collected by Joe Lotz Insurance Agency and remitted directly to them without going through the cash account of \$34,635.00, representing total payments of approximately \$266,000.00.

Q. Well, this balance column over here shows

(Testimony of E. W. Horton.)

parenthetically \$10,670.00. A. That's right.

Q. What do you mean by that?

A. That is amount due from American Fidelity and Casualty Company.

Q. You mean they overpaid themselves ten thousand? A. That is what it indicates. [485]

Q. And owed Lotz that much as of that time?

A. Yes.

Q. What was the state of the record insofar as the Mid-States account as of that date?

A. At that date Joe Lotz owed Mid-States Insurance Company \$417,929.00.

Q. Now, let me understand a little more clearly what you mean now about this payment on account of \$231,000, collections remitted direct of \$34,000.00?

A. Well, \$231,274.00 represents checks drawn on the trustee account and paid to American Fidelity and Casualty Company. Now, the \$34,635.00 represents collections made from various sub-agents owing to Lotz which were sent directly to American Fidelity, didn't go through the regular cash account of Joe Lotz.

Q. In other words, those collections were not banked by Lotz? A. Correct.

Q. But paid directly to American Fidelity?

A. That's right.

Q. Now, do you know from whom any of those funds came?

A. Well, in analyzing the receipts we developed that of the \$34,635.64, \$10,100.00 was for premiums for the account of Mid-States Insurance Company

(Testimony of E. W. Horton.)

and \$24,832.00 were for premiums for the account of American Fidelity and Casualty Company. [486]

Q. In other words, of that amount, \$10,000 was actually collected on premiums written in the Mid-States Insurance Company? A. That's right.

Q. Is that correct? A. That's correct.

Q. Well, now, I asked you to make an audit of the period commencing with August of 1951 and running through September, October and November to see what happened to the collections and disbursements by Lotz for this critical, so-called critical period of 1951, in August after we had the New York meeting that we have been talking about. Did you make such tabulation?

A. I have here a breakdown of those figures that you asked for.

Q. Let us go through the same columns that we did for the year and tell me what happened in that four-month period with Mr. Lotz' money.

Mr. McKinnon: Pardon me, Mr. Garrison, has the witness a copy of what you are now looking at, or just a list of those figures?

The Witness: This is the only one I have at the present.

Mr. Garrison: Want to look over his shoulder?

Mr. McKinnon: No, no, look at it afterwards.

Mr. Garrison: It will be available. [487]

Mr. Garrison: Q. Can you give us the figures?

A. Yes, sir. For the months of August, September, October and November, 1951, the premiums collected for account of Mid-States by Joe Lotz was

(Testimony of E. W. Horton.)

\$199,319.00. During that same period \$434,391.00 was written.

Q. Four hundred what?

A. Four hundred thirty four thousand, three hundred ninety-one dollars insurance was written by Joe Lotz for Mid-States, and during that period Joe Lotz paid on account to Mid-States \$47,417.00.

Q. All right. Now, what happened in the American Fidelity case?

A. During that period there was a total of \$86-444.00 collected by Joe Lotz for the account of American Fidelity, and there was net cancellations during that period of \$34,708.00 and there was paid on account \$132,311.00, and there were checks collected by Joe Lotz remitted direct of \$34,635.00.

Q. Or a total of—

A. Or a total of approximately \$167,000.00 paid during that period to American Fidelity.

Q. Did you find evidence of a cancellation of a block of business that had been written by the American Fidelity and Casualty Company and the rewriting of that same amount in the Mid-States Insurance Company? [488]

A. I found evidence of that, and it was not recorded in the books at the time we made the audit, so we took it up as an adjustment, \$61,016.00.

Q. That is what appears there in the direct middle of the page?

A. Yes, sir, I have it written here as cancellation by American Fidelity and Casualty Company, rewritten by Mid-States Insurance Company.

(Testimony of E. W. Horton.)

The Court: Take a recess. (Short recess.)

Mr. Garrison: Q. Will you read the last question, please?

(Record read.)

Mr. Garrison: Q. You follow that question, Mr. Horton? A. Yes, sir.

Q. And will you tell us the answer?

A. I thought I answered it. I have it appearing in the middle of the page as cancellation by American Fidelity and Casualty Co rewritten by Mid-States Insurance Company \$61,016.00.

Q. And that computation decreases the American Fidelity and Casualty balance by that much, does it? A. That is correct.

Q. Just the same effect as though that money had been paid them?

A. A reduction in the amount due.

Q. Yes. And it is charged against Mid-States?

A. It's—In other words, that's an amount due from Joe Lotz to Mid-States, that sixty one thousand.

Q. So it increases his debt to Mid-States by the same amount? A. That is correct.

Q. That it credits his account to American Fidelity.

After all this business had been cancelled by Mid-States or allowed to expire, whatever happened to it, and the losses had all been paid and the expenses had been totalled up, did you audit the books of the agency from that standpoint?

A. I don't quite understand.

(Testimony of E. W. Horton.)

Q. Well, I notice here you show in the lower half of the page a total as of September, 1952.

A. Oh, yes. We were requested to bring the account balances from the last audit, which was of November 30, 1951.

Q. And as of that date had the policies all been cancelled or had they expired?

A. As we understood, everything had been cancelled out.

Q. Did you see Plaintiff's Exhibit 15, which is the schedule of premiums written, expenses, commission credit and total loss of the Mid-States Insurance Company?

A. Could I see that?

Q. You're probably noticing this total at the bottom of the line.

A. That is what I am confused about.

Q. Yes. Well, this total was reduced after your schedule was [490] prepared as a result of certain conferences between counsel. What figure do you have as the total on your schedule?

A. I have a balance here at February 28, 1954, of \$298,139.00.

Q. Well, that amount has been reduced now by conference between counsel to \$281,746.00. With that difference is the schedule the same, excepting the other figures which have brought about that reduced amount? I might say that the expenses have been reduced, as you will notice, that were chargeable to certain items.

A. What are the changes?

(Testimony of E. W. Horton.)

Q. And did you verify that schedule with your audit report?

A. Yes, this schedule here picks up from the balance I showed in my audit report of September 30, 1952, showing an amount due to Mid-States Insurance Company of \$270,977.00, and from that figure it picks it up and brings it down to the current balance as shown by the Mid-States Insurance books of \$298,139.00.

Q. And any reduction we have made here would be reducing the amount of the total claim of the Mid-States? A. That is correct.

Q. Now, I asked you previously about these December, January and February items that appear before the line on page 13, and Mr. McKinnon asked me in the recess to have you clarify that a little bit. [491]

A. What we did here was we worked back to establish a balance, or starting point, you might say, as due to Mid-States Insurance Company by Joe Lotz, which we developed as of December 1, 1950 of \$62,128.00. And then we were able to apply specific payments against that so that we came down to a zero balance, which indicated that any insurance written after November 30, 1950, was a new balance.

Q. The purpose of that was to try to strike a starting point for accounting purposes, each company was on an equal footing?

A. That's correct.

Q. And that is the effect of that segregation of those payments? A. That is right.

(Testimony of E. W. Horton.)

Q. The fact is that two of those payments were made in January, February, 1951?

A. That's right.

Q. But they are pulled out to show, as I say, this comparison? A. That's correct.

Q. Now, did you find in your audit any particular large payments or receipts by the Lotz Agency and payments to the American Fidelity?

A. Yes, in checking the deposits, the receipts to the deposits in the bank statements, we noticed several large items.

Q. I wonder if you would look at this statement of account [492] with the Anglo-California National Bank, Joe Lotz Trustee, and see if you had that record available to you when you made your audit?

A. Yes, I recall this bank statement.

Q. And you're familiar with the bank statement, of course? A. Yes, I am.

Q. You checked out the deposits and withdrawals that are reflected there? A. Yes, I did.

Q. Now, what particular amount do you have reference to that you say you observed in that account?

A. Well, we noticed in some of the deposits here in September——

Q. Of what year? A. '51.

Q. Yes.

A. That there were large sums of money received from Public Service Insurance Company.

Q. As of what date did you find the first one?

A. On September 7 in deposit of \$14,790.00, we

(Testimony of E. W. Horton.)

found a check from the Public Service of \$5,547.25.

Q. And did you find in the records, or was there made available to you, checks from the Public Service Company in that amount?

A. No, we didn't inspect the checks ourselves.

Q. Did you find other deposits after that that had been made [493] in large amounts?

A. Yes, on September 14, the deposit of \$68,811.00 we found an amount included in their deposit of \$67,500.00 indicated to have been received from Public Service Insurance Company.

Q. And did you find where any withdrawals in substantially the same amounts were made shortly after that date?

A. Yes, there was. On that statement you have placed in as an exhibit, I have on page 21 checks to American Fidelity and Casualty Company, and you notice a deposit of September 11 for \$14,790.00; on September 11 the check was written to American Fidelity and Casualty for \$15,000.00.

Q. Fourteen thousand? A. \$15,000.00.

Q. \$15,000. And what was the balance in the account at the time the deposit was made of the Public Service money? A. After the deposit?

Q. Before the deposit. A. \$3,009.00.

Q. And then the fifteen thousand was deposited, and all Public Service money?

A. The fifteen thousand check was drawn on the account, which left them a balance of \$2,433.00.

Q. All right. I notice here September 15 you have a check A-5011 of \$60,000.00.

(Testimony of E. W. Horton.)

A. Well, that was drawn—after the withdrawal of that check [494] of \$60,000.00, there was left in the account about \$5,300.00.

Q. Well, what date was the \$67,000.00 deposit made?

A. \$67,500.00 deposit made on September 14.

Q. And what was the balance in the account before that, or with that deposit?

A. With that deposit it was 66—wait a minute.

Q. Give us the balance before that deposit.

A. The balance before that deposit was \$2,079.00.

Q. Now, did you find that money withdrawn shortly thereafter?

A. The \$60,000.00 check was drawn on September 15.

Q. That is the following day?

A. The following day of the deposit, yes.

Q. This is the check I show you, which is attached as Plaintiff's Exhibit 19.

A. That is the check.

Mr. Garrison: May I have the bank account?

Mr. Garrison: Q. So, as I understand your testimony, the account had \$2,000 did you say, in it?

A. I think that's correct, September 13.

Q. \$2,079. And then the deposit of Public Service was made on the 14th of September.

A. That was \$68,811.

Q. And on the following day that money was withdrawn in the sum of \$60,000?

A. That's correct. [495]

Q. Paid to American Fidelity.

(Testimony of E. W. Horton.)

Mr. Garrison: I will ask that this original statement of account be introduced as Plaintiff's Exhibit next in order.

The Court: Be admitted and marked.

The Clerk: Plaintiff's Exhibit 24 admitted and filed in evidence.

(Whereupon document, bank statement of Joe Lotz' Trustee account was received in evidence and marked Plaintiff's Exhibit No. 24)

Mr. Garrison: Q. Mr. Horton, did you strike a balance of the Lotz books as of any particular date?

A. Well, we prepared a balance sheet at November 30, 1951, so I assume that would be striking a balance. And also we prepared a balance sheet from the books, without verification of the adjustments, as of July 31, 1951.

Q. July 31, 1951? A. Yes, sir.

Q. Did you have a copy of that? I show you the original and from that balance did you determine whether or not the Lotz agency was solvent or insolvent?

A. This balance sheet here gives effect to certain adjustments as of July 31, and I would say from the looks of this——

Mr. Bronson: May I interrupt you a minute? I am thinking that that might call for a conclusion of the witness, if Your Honor please. He has asked about solvency. [496]

The Court: I am anticipating he may indicate "from the looks of this".

Mr. Garrison: Yes.

(Testimony of E. W. Horton.)

Mr. Bronson: Very well.

Mr. Garrison: Q. Don't tell us from the looks of it, tell us from the figures that are on here; his assets were less than his liabilities?

Mr. Bronson: Wait a minute, he said if some adjustments were made, that might have happened afterwards and been reflected back to that date.

Mr. Garrison: We will ask about the adjustments.

Mr. Bronson: I know, but it is still calling for the conclusion of this man if he is insolvent. The record itself will show what it shows, and then you can read that and make up your own mind, and then we would have the power to cross examine this gentleman and find out.

The Court: I quite agree with you, counsel.

Mr. Bronson: Oh, fine.

Mr. Garrison: All right.

Mr. Garrison: Q. Tell us as of that date what were his assets?

A. His total assets of \$182,758.00.

Q. What were his liabilities?

A. Well, his liabilities exceeded his assets by approximately \$79,000.00. [497]

The Court: What were his liabilities?

The Witness: About \$250,000.00.

Mr. Garrison: Q. You made a reference to some adjustments. What were those?

A. There were some adjustments which were made by another firm of independent accountants.

Q. Who was that firm?

(Testimony of E. W. Horton.)

The Court: It wasn't a competitor?

Mr. Garrison: Q. Who was the individual that worked on it? A. Mr. Marks.

Q. The gentleman that is in the courtroom here?

A. That is correct.

Q. On behalf of the defendants?

A. That's correct.

Q. And what were those adjustments?

A. Well, of two kinds. They were picking up some of the audit adjustments we made as of November 30, 1951, together with the adjustments for the equity in unearned premiums as of July 31, 1951.

Q. And were those adjustments made at his request, Mr. Mark's request?

A. Mr. Marks made those himself on the balance sheet.

Q. And you accepted them as he made them?

A. Yes, sir. [498]

Q. And do they increase or decrease the excess of liabilities over assets? You know, as a matter of fact, don't you, whether they increase or decrease?

A. They didn't make a great deal of difference in the——

Q. Well, all right, what is the fact?

A. What it really did, primarily did was decrease some of the equity in unearned premiums from \$76,000.00 to \$67,000.00.

Q. Is that the only change?

A. Well, that is the only major change.

(Testimony of E. W. Horton.)

Mr. Garrison: Cross examine. I will ask that that be received in evidence.

The Court: Be admitted.

Mr. Garrison: As our next exhibit.

The Clerk: Plaintiff's Exhibit 25 admitted and filed in evidence.

(Whereupon document, balance sheet as of July 31, 1951, was received in evidence and marked Plaintiff's Exhibit No. 25.)

Mr. McKinnon: If the Court please, may I ask Mr. Garrison, did you introduce the work sheets Mr. Horton testified from?

Mr. Garrison: No, I didn't, but I will be glad to.

Mr. Garrison: Q. Will you show me those work sheets. That represents, as I take it, the period August, September, October, November, 1951? [499]

A. That is the ones we were discussing.

Mr. Garrison: Ask this be received in evidence as Plaintiff's exhibit.

The Court: Be admitted next in order.

The Clerk: Plaintiff's Exhibit 26 admitted and filed in evidence.

(Whereupon documents, work sheets, were received in evidence and marked Plaintiff's Exhibit No. 26.)

Mr. McKinnon: If the Court please, may I say in advance that we would like the Court's indulgence to permit us to confer during the noon hour for some cross examination of this witness. I lack Mr. Garrison's—

(Testimony of E. W. Horton.)

The Court: I will indicate an answer for what you have in mind.

Mr. McKinnon: Yes, sir.

The Court: When we adjourn today at noon we will adjourn until Monday morning at ten, give everybody a breathing spell. We have been smothered here. If that is agreeable to both sides.

Mr. McKinnon: Very well. I was going to say I lack the fortitude Mr. Garrison possesses in suggesting adjournments as early as eighteen minutes to the hour, so I was going to say I was unable to question him eighteen minutes without further preparation.

The Court: I saw you look at the clock. [500]

Mr. McKinnon: I can put a question or two, if I may, before the noon hour.

Mr. Garrison: Before you do that, Mr. McKinnon, I am entirely in accord with Mr. McKinnon's request as to reviewing these figures, but I do think Your Honor ought to know, and the record should show that Mr. Marks and his associates, the auditors for the defendants, have had full and free access to all of these books and records, that they were in the Chicago office of Mid-States and they were out here, and they have conferred with Mr. Horton so there has been the maximum of collaboration between us up to this point.

Mr. McKinnon: Well, that fact is correct, but if Mr. Garrison insinuates that we are trying to stall fifteen minutes——

Mr. Garrison: No, no, no, no.

(Testimony of E. W. Horton.)

Mr. McKinnon: All right.

Cross Examination

Mr. McKinnon: Q. Mr. Horton, I wish you would describe, please, the state of the books with reference to whether or not at the time of the passage of events the books were fully posted so that one might see, let us say, each month what the state of the accounts were as between the Lotz agency and the various companies that he represented?

The Court: The testimony was every three months. [501]

Mr. McKinnon: Very well, Your Honor has clarified that much better than I even thought it was. I think you very much.

I have not concluded my cross examination, you will be here at the next session?

The Witness: I will.

Mr. McKinnon: Thank you very much.

Mr. Bronson: May I ask, if I can interrupt at this point, that the witness, Smead, be asked to attend Monday and until excused? Mr. Smead. He is the gentleman that is sitting down there in the corner. You intend to remain here, Mr. Smead?

Mr. Smead: Yes, sir.

Mr. Bronson: For next week's session.

Mr. Garrison: You will have no difficulty with Mr. Horton, he loves it here, he is employed.

The Court: You wish to adjourn now, or do you wish to proceed?

Mr. McKinnon: I would be delighted.

The Court: All right. Proceed, gentlemen.

Mr. Garrison: You have finished your cross examination?

Mr. McKinnon: We have interrupted the cross examination until the next session, with the permission of his Honor.

Mr. Garrison: I think if that is the case we had better not introduce another witness, and possibly we had better adjourn. [502]

The Court: All right, take the adjournment until ten o'clock Monday morning.

(Whereupon an adjournment was taken until

10:00 o'clock a.m., Monday, May 10, 1954.)

The Clerk: Mid-States Insurance Company and Anglo California National Bank versus American Fidelity and Casualty Company, further trial.

Mr. Garrison: Mr. Horton, will you resume the stand?

The Clerk: E. W. Horton to the stand, heretofore sworn.

E. W. HORTON

a witness called on behalf of the plaintiff, being previously sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as follows:

Redirect Examination—(Continued)

Mr. Garrison: Q. Mr. Horton, at the conclusion on Friday, just before adjournment, Mr. McKinnon asked the question which I didn't understand because it seemed a little complicated to me, and I asked the Reporter to have it written up,

(Testimony of E. W. Horton.)

which he has done. I would like to read the question again and ask you if you would tell me if you understand it and if you can give the answer:

“Question by Mr. McKinnon: Mr. Horton, I wish you would describe, please, the state of the books with reference to whether or not at the time of the passage of events the books were fully posted so that one might see, let us say, each month what [504] the face of the accounts were as between the Lotz Agency and the various companies that you represented?” Do you understand that question?

A. I think so, sir.

Q. Would you answer it, please?

A. Well, when we first went in there, the General Ledger had not been posted for several months—September, October and November. The General Ledger, as you probably know, is a summation of all transactions from which you prepare the balance sheet and the profit and loss statement.

However, the detailed posting were made daily to the sub-agents' accounts so that you could determine at any given time what was due to or from a sub-agent. And also, the dailies were written up of the amount of insurance by companies so that the detailed transactions were kept up to date in the detailed records, although not posted in summary to the General Ledger for those months.

Q. As I understand it, then, you could by running a tabulation or tape make a computation to determine the amount of money that was owed Mr.

(Testimony of E. W. Horton.)

Lötz from his sub-agents without reference to the General Ledger?

A. You could do that. It would be approximate. You wouldn't know whether the books were in balance. It would give you an approximation.

Q. Give you a figure? [505]

A. Give you a figure.

Q. That would be approximate. You could also determine by looking at the dailies or bordereaux, copies of which were in his office, the amount of the balance he owed the companies that he represented?

A. You would also work up an approximation, which you wouldn't have a control in the general ledger, but you could determine approximately.

Q. And you could do that without reference to the general ledger?

A. That is right. You wouldn't have a clerical balance upon the details of the control account.

Q. So that you could get a figure?

A. That is correct.

Q. You could get a figure that would be approximately correct at any time, representing the amount of monies due him from sub-agents and the amounts he owed the companies?

A. By running the adding machine type.

Q. And you wouldn't have to do a complete audit to accomplish that, to get a practical, approximate figure?

A. The office staff could run the adding machine tape to get the approximation of amounts due to and from.

(Testimony of E. W. Horton.)

Q. I see. And did you make such a computation when you were in there before you completed the audit?

A. We ran a detail of the sub-agents' accounts receivable, [506] and also worked up a detail of amount due to various insurance companies.

Q. So that you did that by this tabulation of bordereaux in the case of the balance due the companies?

A. Well, we did that, and also had the books posted up so that we would get—see how close the detail was to the controlling account.

Q. And how close was it? I just mean generally.

A. Oh, as I recall, about around \$8,000 difference.

Q. And would that have been possible for someone to do that in August of 1951?

A. Oh, yes. The office staff could run that detail.

Q. In the balance sheet that you made up as of July, 1951, what did you find the premiums, receivables, to be due Mr. Lotz?

A. On that revised balance sheet? \$92,832.

Q. I see. Did you make a—prepare a balance sheet as of November 30, 1951?

A. Yes, sir.

Q. I show you a statement and ask you if that is the balance sheet. A. Yes, sir.

Q. What were the premiums receivable as of November 30, 1951? A. \$95,980. [507]

Q. And what was the excess of his liabilities over assets as of that date? A. \$253,539.

(Testimony of E. W. Horton.)

Q. In other words, in that period they had increased from the seventy-nine figure you referred to before to the two hundred fifty-three?

A. That is correct.

Mr. Garrison: I ask that this November balance sheet be received in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon November Balance Sheet admitted into evidence as Plaintiff's Exhibit No. 27.)

Mr. Garrison: Q. Now, one short further reference to this accounting situation: How long did it take you to complete your audit? I think you testified to that, but I have forgotten what the figure was. Approximately?

A. I was just trying to think. We went in the office of the Joe Lotz Agency around the first week in December, 1951, and I didn't get the report out until April 8th—No, that is the wrong date.

Q. I don't care about the exact date. I just want the approximate time.

A. I think it took us a couple of months.

Q. And that was doing the posting and the over-all job that you have described? [508]

A. That is correct.

Q. And that period of time had no relationship to this procedure that you have just referred to of running your tabulation to show the amounts due companies or amounts of premiums receivable?

A. That was part of our audit.

(Testimony of E. W. Horton.)

Q. Yes, I know; but in reference to the time involved, the running of—the work of running the tabulations, I take it, of the accounts due the companies and the balances due from sub-agents would be a very short period of time?

Mr. Bronson: He hasn't said so, Your Honor. Objection. It is the subject of an answer.

Mr. Garrison: I will ask him.

Mr. Garrison: Q. What would be the period of time necessary to run a tabulation to develop those two figures that we are talking about?

A. I don't recall.

Q. Well, could you give us any estimation?

A. Normally I would say it would take about three or four days to run a tabulation of the accounts receivable.

Q. And the two months that you say were spent there were spent in first posting up the books, in February, then doing your complete audit?

A. That is correct. [509]

Recross Examination

Mr. McKinnon: Q. Mr. Horton, as I understand it, you are saying the books were not posted either with reference to how much was owed by agents to Lotz or with reference to how much Lotz owed the specific companies, correct?

A. The general ledger wasn't posted.

Q. Yes, I understand that. I meant by posting, that is important. Naturally, by going into the entries of Lotz' status, you could derive the data to

(Testimony of E. W. Horton.)

make the postings that you and your accountants did, correct?

A. The summaries, that is correct.

Q. But at the given moment, if at the close of a day, someone wanted to see how much they owed the company, that couldn't be ascertained without further bookkeeping in his office?

A. You would have to run a tape to do that.

Q. When you run a tape, that wouldn't give the result the dignity of a ledger account, would it?

A. It would only give an approximation.

Q. That is right. In other words, you would have to post your books both ways in order to see whether the record was correct of entries with respect to how much Lotz owed companies, correct?

A. That is correct.

Q. The data that you had which you say you could run a tape [510] on wouldn't give a breakdown of agents' balances according to the company for which insurance was written, would it?

A. You could get that from the—the bookkeeping system, they posted the dailies to individual companies and you would get the total from the individual bordereaux.

Q. But you didn't have a breakdown of the companies according—Rather, in respect to a given agent, you wouldn't have a breakdown of companies, would you? That is, if an agent owed Lotz a certain amount of money, you wouldn't be able to determine that without a great deal of bookkeep-

(Testimony of E. W. Horton.)

ing, would you, how much of that money Lotz in turn owed a given company?

Mr. Garrison: Object to the question on the ground as to what a great deal of work might be. It is too indefinite, speculative. A great deal of work to one might not be very much to another.

The Court: This is an expert. He can tell us.

The Witness: The amounts due to each insurance company from each sub-agent, is that what you are trying to get?

Mr. McKinnon: Yes. I am trying to say, perhaps not in the best wording, that when you had ascertained how much was owed to Lotz from a given agent, the data you had to ascertain it did not give it, did it, the amount, the breakdown, as between companies for which insurance was written through that agent?

A. We are speaking of two different things. One, amounts due [511] from sub-agents is only determined in the total amount from a sub-agent.

Q. Yes, that is right.

A. The amounts due to the insurance company was a credit balance in the accounts and we would determine that from the bordereaux by the actual insurance written.

Q. I think that in effect answers my question.

The amounts thus shown to be due from sub-agents to Lotz would be normally subject to confirmation to be reliable, would they not?

A. That is correct.

(Testimony of E. W. Horton.)

Q. As it turned out, the confirmation was badly lacking in very considerable degree, was it not?

A. That is correct.

Mr. McKinnon: If you will pardon me just a moment, Your Honor, I will see whether Mr. Bronson has any questions.

Mr. McKinnon: Q. You referred to the period of time, Mr. Horton, of three or four days as being necessary to do an accounting job a moment ago, in answer to Mr. Garrison's question?

A. That is correct.

Q. How many men would be involved in that labor? How many accountants?

A. I had two men working on that for several days, as I recall. [512]

Mr. McKinnon: I see. That is all the questions.

Mr. Garrison: Step down.

(Witness excused.)

Mr. Garrison: Mr. Lotz, will you come to the stand, please?

JOSEPH P. LOTZ

a defendant herein, called as a witness on behalf of the plaintiff, as an adverse witness under Section 2055 of the Federal Rules of Civil Procedure, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: State your full name and occupation to the Court.

The Witness: Joseph Peter Lotz. I am now in the life insurance business.

(Testimony of Joseph P. Lotz.)

The Clerk: What is your address?

The Witness: 125 Camdon Drive.

The Clerk: In what city?

The Witness: San Francisco.

Mr. Garrison: I am calling Mr. Lotz, if the Court please, as a party defendant in this case and an adverse party to the plaintiff.

Direct Examination

Mr. Garrison: Q. You have been in the courtroom and [513] heard the testimony that has been given? You are the Mr. Lotz that we have been referring to from time to time, are you not?

A. Yes.

Q. And you were an insurance agent of the plaintiff Mid-States Insurance Company through the years 1947 to 1951? A. Yes.

Q. Just keep your voice up just a little bit.

A. All right.

Q. And you represented a number of companies during that period, did you? A. Yes.

Q. And in the years 1949, let's say, what companies did you represent?

A. 1949? Well, I represented the Mid-States, and I had some other companies. The Traders and General, and West American. I can't recall all of them.

Q. And you wrote life as well?

A. Very little.

Q. Other risks? A. Yes.

Q. Fire and casualty, principally?

(Testimony of Joseph P. Lotz.)

A. Yes.

Q. And then, as I understand it, you took on the representation of American Fidelity and Casualty Company in 1951? A. Yes. [514]

Q. Continued your representation in the other companies, did you? A. Yes.

Q. During this period of time?

A. Yes.

Q. It didn't involve any cancellation of any arrangements with others? You simply took on a new company? A. That is right.

Q. Calling your attention to 1951, Mr. Lotz, do you remember the incident of the check being sent to the American Fidelity and Casualty Company and not being honored at the bank?

A. Yes.

Q. And that check was in the sum of \$50,301.88, I believe? A. I think so.

Q. And did you receive from the American Plan or its accountants any letter with reference to that check after it had been returned to them from the Bank not paid (handing document to the witness.)

A. Well, I think this is a letter we received. I don't remember of seeing it.

Q. It is a letter dated August—Pardon me?

A. It is probably correct because I know about the transaction.

Q. The letter is dated August 14, 1951, addressed to Mr. Joe Lotz, Oakland, signed by P. L. Tormina, Chief Accountant? A. Yes. [515]

Q. The letter reads:

(Testimony of Joseph P. Lotz.)

"Dear sir:

"Enclosed please find your check 1670 in the amount of \$50,301.88 returned to you due to insufficient funds. Kindly mail us your check in the amount of \$4.00 to cover the surface charge involved."

That is the check we have been referring to, is it not?

A. Yes.

Mr. Garrison: I ask that this be received in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon letter referred to above was admitted into evidence and marked Plaintiff's Exhibit No. 28.)

Mr. Garrison: Q. I believe that during this period and for some time prior, Mr. Smead had been one of your employees?

A. Yes.

Q. Ralph L. Smead?

A. Yes.

Q. And when had he gone to work for you? Approximately? I don't mean exactly. In 1950?

A. I think in 1950 sometime.

Q. And do you know what his position was when he first came with you?

A. When he first came with me he was an underwriter and [516] general help to me in most of the operations, advisor. Later on, why, he was made general manager. The dates I can't remember exactly.

Q. All right, I understand. I am not concerned about the dates, anyway.

(Testimony of Joseph P. Lotz.)

But after he had been there a few months he was made general manager?

A. After, I would say, about five or six months.

Q. And as general manager, what were his duties?

A. Well, he had full charge of the same capacity which I would probably have myself if I had the time. He supervised the underwriting in the office, also other duties, and bookkeeping and cancellations, and helped me some with the adjustment of losses, and so forth.

Q. Did he have charge of the handling of the finances?

A. To a degree, yes.

Q. How many bank accounts did you maintain, Mr. Lotz?

A. Well,—

Q. I don't mean in which banks. I mean what type of accounts did you maintain?

A. I had a commercial account and also a trustee account.

Q. And what funds were deposited in the one as compared to the other?

A. My commissions, of course, in all companies, went into the trustee account, and my commercial accounts were monies [517] that we transferred and any other monies that I obtained.

Q. You were familiar with the duties of an insurance agent under the laws of California with respect to trustee funds, were you, at that time?

A. Yes.

Q. And the purpose of having the trustee ac-

(Testimony of Joseph P. Lotz.)

count was to keep the funds of companies, I take it, separated from the funds of your own?

A. That is right.

Q. And you did that, did you?

A. I did that.

Q. Well, now, we have made reference heretofore to the first Public Service reinsurance transaction that you had with the Public Service Company. I believe there was a balance due the American Fidelity and Casualty Company as a result of that transaction, was there not, due from you to the American Plan? A. Yes.

Q. Do you remember how much that was?

A. No.

Q. That was about \$6600, was it not?

A. I think so, yes.

Q. And as I take it, you didn't have the funds with which to make that payment when it came due? At least it wasn't paid, was it? [518]

A. I guess you are probably right.

Q. And do you remember when that first Public Service transaction was completed, approximately?

A. I think it was the middle of the year somewhere.

Q. Of 1951? A. I think so.

Q. And that was shortly before your trip to New York, wasn't it? A. Yes.

Q. So that you then had the balance, an amount due the American Fidelity, just before you went to New York, of the \$50,000 check that was returned not sufficient funds and the \$6600 which was due

(Testimony of Joseph P. Lotz.)

because of the Public Service transaction, is that true? A. I think it is right.

Q. You went to New York in August of 1951, did you not? A. Yes.

Q. And do you recall having any conversation with Mr. Hart, the President of the American Plan Corporation, just before you went to New York?

A. We had several conversations. He insisted upon us coming to New York, so that we went.

Q. And did those conversations include reference to this check that had been returned and the balance due on the Public Service transaction?

A. I don't think there was any reference to it. I don't even remember whether that check was previous to our trip to New York or later.

Q. In any case, you had a conversation with him before you went to New York about the condition of your account with them, didn't you?

A. Yes.

Q. And it had some reference to the fact that you owed them money? A. That is right.

Q. And the payments were not made?

A. And I think the check happened before this, now. Yes, that is right.

Q. So can you give us any of those conversations? Do you recall what was said by you and Mr. Hart regarding this account with them and why it hadn't been paid, and so forth?

A. It is pretty hard for me to give any details because I was very much confused and upset.

(Testimony of Joseph P. Lotz.)

Q. Can you give me any substance of that conversation?

A. The substance of those conversations was that Hart wanted the money.

Q. This was before you went to New York?

A. Yes. And he urged us to come to New York to discuss it, so we went.

Q. And you remember the meeting you had in New York? [520]

A. I remember most of it.

Q. And who all was present?

A. Mr. Hart, Mr. Feller, Mr. Will, Mr. Sudekum, who had different titles, Mr. Smead and myself. I don't know whether anybody else was there or not.

Q. Mr. Feller? A. I mentioned him.

Q. Did you have a general discussion there regarding the condition of your agency at the time?

A. Yes.

Q. And who did most of the talking as between you and Mr. Smead?

A. Well, I was not feeling well. I was unable to talk.

Q. Then the answer—— A. Smead.

Q. Smead did most of the talking and you listened in? A. I listened in.

Q. Did Mr. Smead give Mr. Hart some figures as to the amounts that you owed the Company at that time and the amounts receivable that were owing you?

A. I think he gave a general outline of what

(Testimony of Joseph P. Lotz.)

we had outstanding and the possibility of earned premiums, and so forth.

Q. Did he say that you owed the company that \$250,000?

A. We owed about two hundred forty or fifty thousand dollars at that time, I think. [521]

Q. That was the fact, wasn't it?

A. Yes.

Q. And do you know how much you had coming to you in accounts receivable from your sub-agents?

A. I think we had a formula there wherewith our writings——

Q. No, I am just talking about the accounts receivable due from sub-agents. Do you remember that figure? If you don't, just say so.

A. I don't think I can definitely recall.

Q. Would it refresh your recollection if I told you it was about \$90,000?

A. I think it was in that neighborhood.

Q. All right. Now, was there anything said at that conference as to how you might work out to pay the American Fidelity their balance?

A. I don't think we were too much disturbed about working it out.

Q. No, that wasn't the question.

A. Well, I can't answer the question.

Q. You don't recall that portion of the conversation?

A. I don't recall what formula we had.

Q. Do you recall anything said about the writ-

(Testimony of Joseph P. Lotz.)

ing in another company developing premiums that in turn would be used, use those premiums to pay the American Fidelity balance?

A. Not definitely. [522]

Q. You don't recall? A. No.

Q. You don't want to say it did not occur? You just don't remember it?

A. We had to write in other companies the amount of money.

Q. No, my question now is——

A. (Interposing) Yes, I know what it is, Mr. Garrison.

Q. I am simply asking you if you remember the conversation at that time regarding getting another company and putting business in that company and taking the premiums to pay the American Fidelity off?

A. Well, that may have been mentioned. If I might add something here——

Q. No, at this point I am——

Mr. Bronson: Let him answer it completely. You were careful about interrupting the witnesses when they were under cross examination. I suggest the witness be permitted to make any explanatory statement he wants to.

Mr. Garrison: The witness can make any explanatory statement he wants to, certainly, after I have finished my cross examination. But it seems to me I am entitled to an answer to my questions as I give them.

Mr. Bronson: He answered your question.

(Testimony of Joseph P. Lotz.)

The Court: He answered your question and added that he wanted to say something. [523]

Mr. Garrison: You may explain your answer, but only explain the answer.

Mr. Bronson: Let the Judge give the instructions to the witness, Counsel.

The Witness: I had in my mind some thoughts and plans, but sometimes my mind gets ahead of what is transpiring right there; so if I hesitate in these answers, I am not sure, so I don't like to say yes or no.

Mr. Garrison: You can take all the time you want, Mr. Lotz. No one wants to hurry you.

The Witness: Yes.

Mr. Garrison: Q. My question at the moment has to do with that conversation and your recollection of it. If you haven't any, just say so and we will proceed to another question.

A. Another carrier was discussed, but I can't give too much detail.

Q. All right.

A. Because I was a very——

Q. (Interposing) Was the Mid-States Insurance Company discussed?

A. Yes. Mid-States was mentioned.

Q. As one of the possibilities of a carrier and might take some new writings?

A. Well, here was the point. I would like to emphasize that. [524] I had a contract with Mid-States. There was nothing to do there. I wanted to see the Mid-States anyway.

(Testimony of Joseph P. Lotz.)

Q. And you did then go to Chicago, did you not? A. Yes.

Q. An appointment was made for you by someone? A. Yes, there was.

Q. Did Mr. Hart make it?

A. I don't know. The call was made from there.

Q. And the appointment was made with Mr. Hatfield in Chicago?

A. I think I talked to Mr. Hatfield's secretary myself and told her I would be in there and that I was in New York.

Q. Then you did go to Chicago?

A. What is that?

Q. You did go to Chicago? A. Yes.

Q. And had a meeting with Mr. Hatfield and Mr. Hart—I mean Mr. Titus? A. Yes.

Q. And negotiated a new contract at that time, I believe? A. Improved the contract, yes.

Q. Got some concessions? Got an advance commission? A. Yes.

Q. And the contract was subsequently written up, but the details of it were agreed to at that meeting? [525] A. Yes.

Q. And you returned to Oakland then, I believe?

A. Yes.

Q. And you are familiar, are you not, with the second Public Service transaction which involved the cancellation of their policies? A. Yes.

Q. And the fact is that you did take business from the Public Service Insurance Company, place

(Testimony of Joseph P. Lotz.)

it in the Mid-States Insurance Company, did you not? A. Yes.

Q. Cancelled the Public Service policies? And issued new policies, and then you received certain sums from the Public Service? A. Yes.

Q. Which represented premiums for the unexpired portion of the policies? A. Yes.

Q. And you paid those premiums on account of American Fidelity?

A. The major portion of the money came from Public Service alone, and then possibly some other monies we were collecting, yes.

Q. In other words, you paid the Public Service money plus other collections that were made from other sub-agents and [526] other sources that sums were made to the American Fidelity?

A. Yes.

Q. While this was going on, do you recall a balance coming due to the Mid-States Insurance Company of some \$27,000? A. I think so.

Q. And did you have a conversation with Mr. Hart regarding whether or not Mid-States account should be paid, or do you remember such a conversation?

A. It seems I do. I am not too positive right now.

Q. At any rate, Mr. Hart did give instructions for the Mid-States account to be paid?

A. Did he give them to me or Mr. Smead?

Q. I don't know.

A. I don't know, either.

(Testimony of Joseph P. Lotz.)

Q. But you know that such instructions were given? A. Possibly true.

Q. And that was due in August, I believe, then it didn't get paid actually until October, is that correct? A. That is probably right.

Q. Do you recall Mr. Hart and Mr. Feller coming to Oakland? A. Yes.

Q. And you met with them, did you, in your offices? A. Yes.

Q. Did you have discussions there with them regarding the condition of the affairs in your agency? [527] A. Yes.

Q. Were you present on the occasion when Mr. Hart requested that your bookkeepers make a tab run to develop the amount of balances due from your sub-agents and the amounts due the companies? A. I think I was.

Q. And you did develop those figures, your bookkeepers did develop those figures for Mr. Hart when he was out there in August?

A. I think the details were handled by Mr. Smead. I am sure, although I can't be too definite on it, but it is probably right.

Q. You do recall the work being done and the figures being developed? A. I think so.

Q. Did you have any conversation with Mr. Hart and Mr. Feller when they were out here on that occasion regarding this Public Service transaction that was in prospect? I am not asking you the details of any such conversation. I just simply

(Testimony of Joseph P. Lotz.)

asked you if you recall talking to Mr. Hart and Mr. Feller about that Public Service deal.

A. I can't answer definitely. There is a possibility and I think we probably did, but I don't want to go on record and say that we did.

I would like to add one more point: I was in a very bad [528] nervous condition at that time, so some of these answers I don't know due to the stress I had. And I was facing a couple of operations and worry. Mr. Smead handled most of these things. It may have been discussed at that time, but I am unable to mention specific details.

Q. I wasn't asking about specific details. I just wanted to know if you recall.

Were you present at any time when Mr. Smead discussed the Public Service transaction with Mr. Hart and Mr. Feller?

A. That is about the same question.

Q. Well, I will withdraw the question for the moment and come back to it later.

A. Yes.

Q. You had a teletype machine, receiving and sending unit in your office?

A. Yes.

Q. And you received and sent a number of teletype messages to Mr. Hart in New York during the months of August and September, 1951, did you not?

A. Yes.

Q. I will show you a series of sheets here and ask you if you can identify those as being transcripts of those teletype messages between your office and Mr. Hart's office, and you and Mr. Hart and Mr. Smead and Mr. Hart? I don't want to

(Testimony of Joseph P. Lotz.)

bother you with each and every message, but if you will just [529] look through those to determine if they are familiar to you. A. Yes.

Q. As being teletype messages that came to your office?

A. This refreshes me that we discussed them.

Q. And what is your answer now with respect to discussing with Mr. Hart and Mr. Feller when they were out here in Oakland in your office the Public Service deal?

A. Well, the answer is that they were discussed, yes.

Q. All right. And when these teletype messages came in and were sent out, did you on each day as you came in and out of the office, look at them to see what messages had been received or sent? Not every one, but I mean was that your custom as you went about your office to check these teletypes when they came in?

A. No, I did not check them much. That deal was completely in Mr. Smead's hands. The prime reason was that I was getting pretty well unstrung with this thing and I threw it all into his lap.

Mr. Garrison: I neglected to offer that. I will ask that these teletypes be received in evidence as Plaintiff's Exhibit next in order.

The Court: They may be admitted and marked.

(Whereupon teletype messages referred to were admitted and marked in evidence as Plaintiff's Exhibit No. 29.) [530]

Mr. Garrison: Q. I notice, Mr. Lotz, that a

(Testimony of Joseph P. Lotz.)

number of these messages were actually sent by you. You recall sending some?

A. They weren't sent by me. They were sent by Mr. Smead. I had nothing to do with them. He signed my name.

Q. I notice a number he signed his own name and on a number your name appears.

A. I know, but they were still sent by him.

Q. And you discussed them from time to time with him, however, I assume? A. Yes.

Q. And were generally familiar with what went on? A. That is right.

Q. Sir? A. Yes.

Q. Did you actually receive the money from the Public Service Company yourself or did someone else receive that when the payments were made?

A. I was away at the time. The whole thing involved these checks, I think, most of them, at least, were handled by our bookkeeping department.

Q. Did you see them before they were deposited in the bank? A. I may have seen one——

Q. Referring now to Plaintiff's Exhibit 5.

A. I may have seen one of those, but I didn't see them all. [531]

Q. You knew they were due and did come in, did you?

A. These had the stamp. They were handled by our Bookkeeping Department.

Q. You would know that those sums were due from the Public Service and did come in?

(Testimony of Joseph P. Lotz.)

A. I knew what was going on, but I wasn't in Oakland at the time.

Q. I see. You didn't personally handle it?

A. No.

Q. And you knew they had been deposited in your Trustee Account? A. Right.

Q. I see in the checks, Plaintiff's Exhibit 19, a series of checks dated September and October of 1951, made payable to American Fidelity and Casualty Company, and they seem to bear your signature. A. Yes.

Q. Is that in fact your signature?

A. Well, this first is mine. These here are signed by Smead. And this is my son. This is mine. There are two of them. This is not mine. That is mine. Four of these checks are my signature.

Q. So that your son had authority to sign checks on this Trustee Account?

A. In combination with Mr. Smead. [532]

Q. And did Mr. Smead have authority to sign checks on the Trustee Account? A. Yes.

Q. And you signed some if you were present, and if not, they would sign them? A. Yes.

Q. You did know, however, those payments were made out of that Trustee Account with Public Service funds to the American Fidelity and Casualty Company?

A. I did when I returned from my trip, yes.

Q. Did you know the American Fidelity maintained a bank account over there in Oakland in the Central Bank? A. Yes.

(Testimony of Joseph P. Lotz.)

Q. And that these deposits were in the account, were made in that account in that bank?

A. Yes.

Q. Now, when Mr. Hart and Mr. Feller were out here and when this Public Service re-write was started, did they give you or Mr. Smead in your presence any instructions about what should be done with the monies when they came in?

A. I think that was discussed with Mr. Smead and Mr. Hart, and possibly I was there, but again my memory is not too good just what was said.

Q. I am not interested in the words or identical details.

A. We were to have another account there in favor of the [533] American Fidelity, and Mr. Smead was to transfer the money into that account instead of sending it to New York.

Q. That was the conversation, the substance of it?

A. Yes.

Q. I notice this letter that is signed by you and addressed to Mr. Hart, or rather to the American Plan Corporation, and having the effect of terminating your agency, copy of which I will show you. I don't see the exhibit number. Dated August 22, 1951. Is that your signature?

A. Yes.

Q. Did you dictate that letter?

Mr. Bronson: What is the exhibit number?

Mr. Garrison: I can't lay my hands on it at the moment.

Mr. Bronson: There are some in the Clerk's desk. Is that a defendant's exhibit?

(Testimony of Joseph P. Lotz.)

Mr. Garrison: Q. Do you recall the letter that I am referring to?

A. Well, it is my signature.

Mr. Garrison: I will show this to counsel.

Mr. Bronson: May I take a look at it?

Mr. Garrison: (Handing document to Mr. Bronson).

Mr. Garrison: Q. Did you dictate that letter?

A. I don't know.

Q. The letter is on the American Fidelity and Casualty Company stationery. [534]

A. It is on the—It is on my stationery.

Q. It is on your stationery, dated August 22, 1951, addressed to American Plan Corporation, New York:

“Gentlemen: Pursuant to my discussion with your Mr. Hart in New York on August 13, 1951, and particularly in view of your inability to comply with my request for a prepay commission, I hereby terminate my agency agreement with American Fidelity and Casualty Company, effective immediately, and trust that you will signify on the copy of this letter your acceptance of the immediate termination notwithstanding the 30-day notice prescribed in the agreement.

“Yours very truly, Joe Lotz.”

Then below it, it says:

“Agreed”, and then “American Plan Corporation, Mark M. Hart, President.”

Do you remember signing that?

A. I don't even remember signing it.

(Testimony of Joseph P. Lotz.)

Q. Do you recall sending it?

A. But it has my signature so it must have happened, but I don't know—I don't know whether I concocted that letter myself or was helped on it. I wish I did, but I don't.

Mr. Garrison: I will ask that this be received in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon letter referred to above from Lotz to American Plan Corporation, dated August 22nd, 1951, received and marked in evidence as Plaintiff's Exhibit No. 30.)

Mr. Garrison: Q. You don't have any recollection, then, as to when you signed it or where it was handed to you or when you first saw it?

A. I don't remember the exact incident.

Q. Do you remember when Mr. Hart and Mr. Feller left Oakland, and met you at the Central Bank at Oakland on the morning of their departure, you and Mr. Smead? A. Yes.

Q. Do you recall that occasion? A. Yes.

Q. And you at that time, I believe, were handed the contracts or contract that has been referred to in this case as Plaintiff's Exhibit No. 12? Do you remember that contract (Handing document to the witness)? A. Yes.

Q. Do you remember the morning when——

A. (Interposing) Yes. I don't remember the date, but I remember that morning.

Q. And this contract was handed to you by Mr. Hart, was it? A. Yes. [536]

(Testimony of Joseph P. Lotz.)

Q. Then when did you sign it? On that day, or some other date?

A. I think it was signed right there, although I am not too positive, but it seemed to me we signed it.

Q. That morning? A. I think so.

Q. By both you and Mr. Smead?

A. Yes.

Q. And this is the contract that designates Mr. Smead as having supreme authority over the financial affairs of the American Fidelity and Casualty Company? A. That is right.

Q. And do you remember his handing Mr. Smead a separate envelope on that same occasion?

A. I did not see that. I knew nothing of it.

Q. Did you ever see it after——

A. No.

Q. After they left?

A. I never saw it after that. I never knew anything about it. I don't even know how I found out about it, but I never knew about it for a long time.

Q. I show you Plaintiff's Exhibit 18, which is the letter on American Plan Corporation stationery of August 17th, addressed to Ralph L. Smead, and signed "Mark M. Hart", and see if looking at that refreshes your recollection as having [537] ever seen it? A. No.

Q. Sir?

A. I don't recall ever seeing this letter.

Q. Didn't Mr. Smead tell you about it?

A. No.

(Testimony of Joseph P. Lotz.)

Q. After they left?

A. I never knew about it until recently. I never knew about it. That is absolutely something that I knew nothing about.

Q. This is the letter that offers Mr. Smead \$1,000?

A. Yes. I never saw that letter before.

Q. You didn't know that Mr. Smead called Mr. Hart in Los Angeles and repudiated the proposition entirely? A. No.

Q. He didn't take you into his confidence on that? A. No.

Q. And in this contract that I have been—that I have just shown you, that was signed there at the Bank that morning, which designated Mr. Smead as our agent with supreme authority over their financial affairs, you knew that that designation was made by them that morning? A. Yes.

Q. And you were agreeable, were you, that Mr. Smead act as their agent under that contract?

A. Yes. [538]

Q. Well, after they left did you receive frequent phone calls from them and telegrams and teletype messages? A. Yes.

Q. And those messages have been read here. I won't—you heard them read? A. Yes.

Q. I won't burden you with them. What effect did the designation Mr. Hart made have on you as an individual?

A. That is why my memory is bad. I wasn't normal. I was worried about the matter, about get-

(Testimony of Joseph P. Lotz.)

ting this money paid, so we were trying to plan, think out some way of doing it.

Q. Well, when he threatened to take the matter up with officials of the insurance commissioner, did that have an effect upon you?

A. Yes, it did.

Q. And did you do things under compulsion of those threats that you might otherwise not have done?

Mr. Bronson: I object to that. It is difficult—just a moment—

The Court: Change the form of the question. Objection is sustained.

Mr. Garrison: Q. In any event, the threat that he made did affect you, did it, Mr. Lotz?

A. That was a cause of great worry to me, yes, so I was pretty much not normal. I was worried about bills. I have been [539] all my life. I wanted to get this thing out of the way, and we had a plan.

Q. Do you remember when Mr. Hatfield came out? A. Yes.

Q. And had some meetings with him, did you not? A. Yes.

Q. And that was somewhat after the time Mr. Hart and Mr. Feller left? A. Yes.

Q. As a matter of fact, that was after their account got paid in full, wasn't it? After the American Fidelity account got paid in full?

A. I think it was, yes.

Q. And do you remember the occasion when you

(Testimony of Joseph P. Lotz.)

drove Mr. Hatfield over to see the insurance department? A. Yes.

Q. And you stopped at a drive-in to have a bite of lunch?

A. I think this conversation happened in my car. I don't remember the circumstances at the drive-in, but I think it all happened in my car.

Q. Will you tell us what it was you told Mr. Hatfield on that day? Whether it was in the car or getting a cup of coffee wouldn't make any difference?

A. Do you want me to tell the conversation, what happened?

Q. The best you can recall. [540]

A. I had been taking Mr. Hatfield over to the insurance department for a number of days. I don't remember, a week or two we went over there every afternoon or so. What we were trying to do in that insurance department, we were trying to get a new setup on rates. I would wait for Mr. Hatfield until he came down, and some days we had a ray of hope that we might get better rates. Other days it was depressing.

So I guess this was the day they made their final decision. This all was during the time when I was still employed by the Mid-States at a salary of about \$900 and something a month to help get this thing in more or less shape, and when we had a tentative agreement to possibly work this out.

Q. I am just interested in the conversation between you and Mr. Hatfield.

(Testimony of Joseph P. Lotz.)

A. All right. Mr. Hatfield came to the car and he said, "Well, the answer was no. We can't get an adjustment of rates."

We were both pretty low, and I was very low, and Hatfield sort of reprimanded me for not taking him into the full confidence, and so forth, and I made some of those statements which I mentioned the other day.

Q. He told you he lost some confidence in you?

A. Yes, because I should have told him more about this, because he and I were pretty understanding of each other all the time. And I drew a conclusion there which I had no right to say, and I said, "Hart must have known about this", or something [541] like that.

That was about the main—. Then that got him excited, so he called Mr. Titus.

Q. On that occasion didn't you make some reference to the Public Service rewrite?

A. I may have, but I can't recall it.

Q. Did you tell him the premiums you got from Public Service had been used to pay American Fidelity?

A. I don't know.

Q. Did you say all collections had gone to American Fidelity and only one payment to the Mid-States?

A. I can't answer that.

Q. Did you tell him that when you got all through with that a \$61,000 balance that was owed American Fidelity was carried and present on the books of Mid-States?

A. Would you repeat that question?

(Testimony of Joseph P. Lotz.)

Q. Well, did you tell him in the conversation anything about taking this \$61,000 worth of business off the books of the American Fidelity and putting it on the Mid-States books?

A. I don't remember that.

Q. You don't recall?

A. I don't think I did.

Q. You don't think you did. Well, do you remember going back after that trip and getting hold of Mr. Smead? A. Yes. [542]

Q. And Mr. Hatfield recounted, did he, with Mr. Smead what you had told him? A. Yes.

Q. And reviewed the whole past in some considerable detail, didn't he? A. Yes.

Q. And you concurred in what Mr. Hatfield said? A. I think I did to most of it.

Q. Yes. And then you say Mr. Hatfield called his principals in Chicago? A. Yes.

Q. I believe that disturbed you a little bit about his calling Mr. Titus, didn't it? Didn't you protest that and ask him not to do that, or hope he wouldn't do it? A. I think I did.

Q. And why were you so concerned about his telling Mr. Titus?

A. Because I thought we could work this thing out. I thought the thing would readjust itself.

The Court: Take a recess.

(Short recess.)

Mr. Garrison: Q. Mr. Lotz, you made a refer-

(Testimony of Joseph P. Lotz.)

ence before the recess to, I think you said, being on a salary with Mid-States? A. Yes.

Q. Do you have reference to the proposal that you made [543] November 27th to Mr. Hatfield, which is Plaintiff's Exhibit 6, in which you say that, "I have limited my drawing account to a maximum \$600 a month and also limited my travel and entertainment expenses to a maximum of \$350 a month"? Is that the arrangement you had reference to?

A. Yes. I limited it—. Can I amplify that?

Q. Yes.

A. That was drawn up more or less by Mr. Oldberg, and it is an agreement, the continuation of it, I was to draw \$600 a month and \$350 a month for expenses, that's right.

Q. This letter of November 27th was sent to Mr. Hatfield as a proposal by you as to how you were going to continue to operate your office, wasn't it? A. Yes.

Q. And under this proposal you were to continue functioning as a general agent?

A. Very limited, though. Very limited.

Q. And the withdrawals referred to here were withdrawals by you from your own funds, weren't they? A. That's right.

Q. So that it isn't accurate, is it, to say you were on any salary from Mid-States? You mean you proposed to pay yourself out of your own general agency income this money?

A. I was being paid. I had no right to write a

(Testimony of Joseph P. Lotz.)

check any more at that time. Everything was taken away from me. [544]

Q. Under this proposal you were contemplating you would pay yourself out of the general operation \$600 salary and \$350 expenses, is that correct? A. Well——

Mr. Bronson: Doesn't the document speak for itself?

The Witness: A. This thing——

Mr. Bronson: Go ahead.

A. This thing was submitted to me and I signed as though I wrote it. That was the agreement.

Mr. Garrison: Q. Pardon me. It was in the form of a proposal to Mr. Hatfield?

A. Yes.

Q. And it was never accepted and didn't ever come into actual existence, did it?

A. Yes, they paid me \$600 and \$350 for a month or so.

Q. You mean you withdrew that from your general agency?

A. The checks were handed to me. I was paid that.

Q. I see. At any rate, in connection with the phone call to Mr. Titus, you did ask Mr. Hatfield if he couldn't put that off or not make it?

A. Yes.

Q. And do you remember after he said no, he would have to call Mr. Titus and report what you had told him—— A. Yes.

(Testimony of Joseph P. Lotz.)

Q. —he did call Mr. Titus, didn't he? [545]

A. I think he did.

Q. Do you remember, then, after that, his asking you and Mr. Smead if you would write out statements of the facts you had given him?

A. Yes.

Q. And do you remember Mr. Smead writing out his statement?

A. Yes, sir, I remember Mr. Smead writing.

Q. And he wrote it there in this place of business, didn't he? A. Yes.

Q. And that is Plaintiff's Exhibit 11. Do you recall that? You have seen it many times?

A. Yes.

Q. Were you there in your place of business during that afternoon and evening?

A. I was there, I think, in the evening. In the evening, I think.

Q. Observe Mr. Smead's writing it?

A. Well, I was trying to write one out myself and I observed he was writing, yes.

Q. And you didn't get yours completed, did you? A. No.

Q. But I believe you met in your lawyer's office next day with this statement and Mr. Smead and Mr. Hatfield and Mr. Titus?

A. We were supposed to meet there next morning, and I think this statement that we made that night was really supposed to [546] be written in Mr. Mead's office. We had an appointment for next

(Testimony of Joseph P. Lotz.)

morning, and I don't think any appointment was kept.

Q. You met there in the evening instead?

A. Mr. Mead was supposed to check the statements to see if they were all right for us to go ahead. That is the way my memory is on it now. That is the best I can remember of that.

Q. That's good. And you met that evening instead of in the morning in Mr. Mead's office?

A. We met——

Q. And the meeting—. Wasn't it in the evening you went to Mr. Mead's office?

A. Again, I don't know.

Q. At any rate you all did meet there at some time shortly after the December 5th or 6th when Mr. Smead wrote this out? A. Yes.

Q. And the document was signed by you on that occasion? A. Yes.

Q. And the notary, Mr. Mead, acknowledged your signature and Mr. Smead's signature?

A. Yes.

Q. As a matter of fact, Mr. Smead didn't sign it until that occasion in Mr. Mead's office, did he?

A. I think that is correct.

Q. And I notice in this statement there are a few changes which were made and which were initialed by you and Mr. Smead. [547] Those were made thereon that occasion in Mr. Mead's office?

A. I don't know.

Q. Well, the document was read over on that occasion by Mr. Mead, wasn't it, and discussed?

(Testimony of Joseph P. Lotz.)

A. I think it was.

Q. And the changes that were made were made there at that time? A. Yes.

Q. And that was all done before it was signed by you or Mr. Smead and before the notary acknowledged the signature?

Mr. Bronson: We will object to the second question being asked before the first one was answered. There was no answer to that at all and there is no way for this record to indicate, unless the reporter saw something or heard something that I didn't.

The Court: Read the last three questions and answers.

(Last three questions and answers read by the reporter.)

Mr. Garrison: Q. Can you answer that?

A. Well, I think they were.

Q. Do you remember the execution of Plaintiff's Exhibit 12 and Plaintiff's Exhibit 13 and Plaintiff's Exhibit 22, being the supplements that Mr. Smead made to his statement on the second and third day following its completion?

A. I don't remember this part over here about the statement. [548]

Q. Do you remember Mr. Smead making up this supplementary statement to his original statement?

A. I remember him writing an addition.

Mr. Bronson: I can't hear the witness.

The Court: "I remember him writing an addition."

(Testimony of Joseph P. Lotz.)

The Witness: A. I remember him writing an addition. He wrote about ten pages there, I think.

Mr. Garrison: Q. That was the principal statement and he supplemented it next day?

A. Yes.

Q. And is that the supplement he wrote out, do you know?

A. That is his handwriting, yes.

Q. You saw it on that occasion when he completed it? A. Yes.

Q. Certainly. And do you remember the one he wrote on the 8th, the following day (handing document to the witness)? A. Yes.

Q. You remember that? A. Yes.

Q. Now, you say you didn't get the statement completed that night, but Mr. Smead completed his, is that correct?

A. I think that is correct, yes.

Q. And after reading over Mr. Smead's statement, you yourself wrote out a supplement to his statement, I believe?

A. I wrote out—can I amplify that? [549]

Q. Certainly. Just answer my question first.

A. Yes.

Q. Did you write out a supplement to his statement? A. Yes.

Q. And when did you do that?

A. I don't—I think this is the additional statement that I wrote out at the insistence of Mr. Titus. If this is what I think it is, it is something I had to bring to him in Los Angeles.

(Testimony of Joseph P. Lotz.)

Q. Yes. A. I think this is the one.

Q. Do you want to refresh your memory by looking at it?

A. One statement here that I would like——

Q. (Interposing) I am not talking about the details of it now.

A. Yes. It is about that \$1000. I told you before I didn't know about that, and here I've got that in writing.

Q. That is right.

A. That is about right.

Q. That is dated December—. Actually, it doesn't have any date on it. It simply refers to Mr. Smead's statement of December 6.

A. Yes. It was in December.

Mr. Garrison: I ask that this be received in evidence as Plaintiff's Exhibit next in order. [550]

The Court: It may be admitted and marked.

(Whereupon Statement dated December 7, 1951, was admitted into Evidence as Plaintiff's Exhibit No. 31.)

Mr. Garrison: Oh, yes, I notice under your signature there appears "12/7/51". It was folded over.

A. Oh, yes.

Q. That is the date?

A. In December, yes.

Q. Just right after Mr. Smead's statement?

A. Yes.

Mr. Garrison: I would like to read this if I may, Your Honor:

"On thinking over the statement of December 6,

(Testimony of Joseph P. Lotz.)

1951, made by Mr. R. Smead, which I also signed, I feel that I should add the following to it as a supplement.

“Mr. Smead was called in at the Palmer House in Chicago, but I do not remember him discussing the Public Service transaction and I did not discuss this with Mr. Hatfield during my visit with him.

“I also want it known that I was under extreme pressure from Mr. Hart and also Mr. Hatfield, and I agreed upon a new contract with Mid-States. I [551] telephoned from the Palmer House to Mr. Sudekum of the American Plan and advised that the contract was completed.

“As I recall, I told him the commission terms of the contract.

“I also wish to state that I had no knowledge of the letter given to Mr. Smead by Mr. Hart or that he had been offered \$1,000 until December 6, 1951.

“I did not discuss the Public Service deal with Mr. Hatfield until after it was completed.

“I always left the operation of the office to Mr. Smead and followed his advice. Mid-States was paid on the risk with the Public Service by me before they knew about it.

“I also was advised by Mr. Hart not to contact Dick Cass while in Chicago because Mr. Cass might contact Mid-States as he might be friendly to them.

“Signed, Joe Lotz, 12/7/51”

Mr. Garrison: Q. As I understood you to say, where were you when you wrote this out?

(Testimony of Joseph P. Lotz.)

A. I wrote that out in my office and I took it to Mr. Oldberg's home in Santa Monica on Twenty-second Street—I think 219 Twenty-second Street, as I remember the address—and I handed it to him at the door there.

They were there getting ready for dinner. That is all [552] there was to it. There was no conversation at all, which was implied previously. I just handed him the paper and that was it.

Q. Mr. Titus and Mr. Hatfield were in Santa Monica?

A. They were there, and there was another vice-president, and there was another vice-president, and Carl Oldberg and Mr. Hatfield I think were there.

Q. And you carried this with you from Oakland to Santa Monica? A. I brought that.

Q. Were they in Santa Monica when you wrote it out, so far as you know?

A. I wrote it in my office, and they went from Oakland down there. I don't know whether they were there.

Q. You had gone down there, at least, to make some collections from some of your accounts?

A. Yes. I was supposed to be down there.

Q. Who was present when you wrote this out? Anyone besides yourself?

A. I don't know whether Mr. Smead was with me or not, but I don't think—if he wasn't, I don't think anybody else was.

Q. Did Mr. Titus ask you to make out some supplement to Mr. Smead's statement?

(Testimony of Joseph P. Lotz.)

A. Yes. He wasn't satisfied with what I wrote. He wanted some more and that is what I gave him, an additional statement.

Q. And it is a fact that Mr. Hart told you not to contact [553] Mr. Cass when you were in New York? A. Yes.

Q. Mr. Cass was a former employee of Mid-States? A. Yes.

Q. And also a former employee of American Fidelity?

A. I don't know whether he is with them yet or not, but he was with American Fidelity.

Q. At that time? A. I think so.

Q. And did he tell you that he was afraid Mr. Cass might be friendly with Mid-States?

A. He mentioned that, yes.

Q. And that was in the meeting in New York?

A. Yes.

Q. And he also told you when you were in Chicago not to disclose his part in any of these plans—Mr. Hart told you that?

A. I don't think he did specifically, no. No.

Q. He just told you not to see Mr. Cass?

A. Not to see Mr. Cass. Which I attached no significance to at that time, because that was just something that came up incidental to, I said, "I am going to stop to see my friend, Dick Cass", and he said, "I don't think I would see him", and there was no specific significance to that. I don't know what bearing that has myself. [554]

(Testimony of Joseph P. Lotz.)

Q. You mean there is no significance to you about his suggestion? A. Yes.

Q. That, of course, is something others might have attached significance to? A. Yes.

Q. When Mr. Smead made his statement and you made your supplement and he made a statement, you and he collaborated with each other, didn't you, in discussion as to what would go into that statement and what was said, and so on?

I mean by collaborate, you exchanged opinions and views and discussed it back and forth?

A. I was very much influenced by Ralph's point of view because of my mental condition at that time. I wasn't too much good on a good equilibrium basis with this worry and other things, physical conditions.

Q. Well, by this time the pressure from Mr. Hart had been removed because he had been paid, so you weren't under any pressure at that time, were you?

A. Yes, I was under pressure by the company.

Q. Well, the answer is that you and Mr. Smead talked back and forth between each other as to making out these statements, didn't you? You and Mr. Smead discussed them? A. Yes.

Q. You remember coming into my office, Mr. Lotz, don't you? [555] A. Yes.

Q. And do you remember who was present?

A. I think Mr. Mead and Mr. Smead.

Q. Mr. Titus?

A. I don't remember if he was there.

(Testimony of Joseph P. Lotz.)

Q. And we had a general discussion there that morning on all of these events? A. Yes.

Q. And I asked a number of questions of both Mr. Smead and yourself about the statements and you answered them, didn't I? A. Yes.

Q. And you told me in great detail, both you and Mr. Smead, all of the events of the preceding two or three months, about the New York meeting and about the Public Service cancellation, and the paying of money on that account, didn't you?

A. I think we did, yes.

Q. And then after we talked about it for three quarters of an hour or so I called in my secretary and dictated this Plaintiff's Exhibit No. 20, consisting of four and one-half pages of close, single-spaced material (handing document to the witness)?

A. This is a statement by Mr. Smead. You don't have my signature on that, do you?

Q. The particular copy that you have in your hand was signed by Mr. Smead, but there is also a copy, another document, which [556] was signed by you. A. Do I mention in that——

Q. (Interposing: I show you photostatic copy of another draft of the same document.

A. Yes.

Q. And you will see it bears your signature.

A. Is this the same thing?

Q. That is exactly the same. I am not asking you to answer as to all the details in the document now, Mr. Lotz. I am just asking you if that is the document I dictated that day to my secretary?

(Testimony of Joseph P. Lotz.)

A. Yes, I think this is about it. But today some of those points——

Q. I am not asking you about points at the moment. A. All right.

Q. I am asking you about this document.

A. All right.

Q. And it was signed by both you and Mr. Smead afterward? A. That is right.

Q. She was out transcribing it for some half-hour, was she not, after it was dictated?

A. I think so.

Q. Did we wait there in the room, and have further discussion on the subject?

A. Yes. [557]

Q. When she returned with this she had a number of copies, did she not? A. Yes.

Q. And I read this document out loud to all there in the room, didn't I? A. Yes.

Q. And each person had a copy in his hand and followed me as I read? Do you remember that?

A. Yes.

Q. And we came to page 3 and we found that there were a number of places where changes were made by you and Mr. Smead, did we not?

A. Right.

Q. Is that true? A. I think so.

Q. And when I would come to a place—as an example, on the top of the page I had dictated “Los Angeles” and the correct town was Oakland as being the place where the conference was held,

(Testimony of Joseph P. Lotz.)

and I was stopped and advised it wasn't Los Angeles but it was Oakland? A. Yes.

Q. And I thereupon made the correction in ink, did I not?

A. (Nodding in the affirmative.)

Q. And we went all through the document in the same way, and on page 3 we made actually four changes? [558]

A. Yes. What is the date of that?

Q. This is not dated. A. Oh.

Q. It was in December, do you remember?

A. Yes. 1951?

Q. 1951, yes. And when we came to page 4 we found the name of Smead and Hart had been transposed, and it was called to my attention and we made that change at that time in ink.

A. Yes. [559]

Q. In fact, I believe Mr. Smead made that correction. Did you see that?

A. Yes, I see it.

Q. When we got to Page 5 we found that also I thought that Mr. Hart had teletyped, and it was called to my attention he had telephoned, and that change was made by Mr. Smead, was it not?

A. (No audible response)

Q. When, after each of the corrections were noted, after the change had been made, I asked each of you, Mr. Smead and yourself, if you wouldn't initial the margin where the change was interposed and you did so initial it?

A. That is my signature there, yes.

(Testimony of Joseph P. Lotz.)

Q. Yes, sir. And when we finished with the changes, you were asked if that represented a correct statement of the facts and everybody said yes, it did, isn't that correct? A. Yes.

Q. By the way, Mr. Lotz, I believe you kept as part of the personal records, separate and apart from the books and accounts of the Agency, a black diary book that had been given you by J. A. Berger, Inc. A. Yes.

Q. Do you remember that book? A. Yes.

Q. And you kept certain records in that book as to [560] materials that were received and as to monies that were received and monies that were paid and to whom paid? A. Yes.

Q. Do you still have that book?

A. I think the records I had were probably taken by Mid-States. Did you folks get it?

Q. I don't recall. I don't know whether it was kept in the office or if you still had it. It was something you carried personally, wasn't it?

A. In my pocket?

Q. Yes. Do you recall where it is now?

A. Are you referring to a book where I kept the record of my account as we brought it down into companies?

Q. Company balances and premium income due from agents. Balances due from sub-agents.

A. I might have that book somewhere.

Q. As a matter of fact, you sort of kept that up

(Testimony of Joseph P. Lotz.)

to date, didn't you, so that you had a record in your pocket as to what premiums had been written and how much in all the companies?

A. I think Mr. Smead was putting some marks in that book. A record of those deposits. Is that what you mean?

Q. Yes. Balances due companies, and how much deposited and from what account, and so forth.

A. Yes.

Q. So that you kept a personal record outside of the [561] accounting procedure in the office, kept a personal record of the state of your agency, didn't you?

A. I kept a record at this particular time on how their account was reducing, mostly with the American Plan.

Q. In other words, you were recording the payments that were being made on the American Plan Account? A. Yes.

Q. So that each time a deposit went into their account in the Central Bank you noted it in your black book?

A. I wanted to see it shrink. I was keeping a record, yes.

Q. That was because of your anxiety to get that account paid? A. Yes.

Q. By the way, this rewrite of the business of the American Fidelity and Casualty Company that occurred, \$61,000 that was? Will you answer aud-

(Testimony of Joseph P. Lotz.)

ibly? The Reporter must get it. You shake your head, but he can't see it. A. All right.

Q. And that resulted as a transaction to wipe out the balance due them after these other cash payments had been made, I take it?

A. That entire transaction was handled by Mr. Smead, and I was away. I can't give you too much information on that, only that it was turned over to Mr. Smead, and Mr. Hart and [562] Hatfield handled that.

Q. You knew at the time, didn't you, that every one of them had already paid their premiums for that business, didn't you?

A. I didn't know that all of them was paid, but I knew that most of them had, yes.

Q. And you knew that you couldn't go back to those same assureds and collect that premium twice?

A. No.

Q. And that you didn't have any money at that time?

A. I would like to make a remark here. Something has been disregarded all the way through here. I had between five and six hundred thousand dollars in reserve with these two companies which has been completely ignored, and this represented money I have accumulated back there for me, and that item should off-set an awful lot of these things. We were working on it.

Q. Do you know that the so-called accumula-

(Testimony of Joseph P. Lotz.)

tion that you had with American Fidelity and Casualty Company, according to their books, ended up to be \$10,000, approximately?

A. I knew it was about \$85,000 at one time.

Q. Well, it probably went in losses paid the assureds, didn't it?

A. I had a 20 percent guarantee with American Plan and it was up to \$80,000. I got that regardless of losses.

Q. At any rate, the present balance, apparently, on the [563] books of American Fidelity is about \$10,000? A. Yes.

Mr. Garrison: Cross-examine.

The Court: We will recess until two o'clock.

(Whereupon an adjournment was taken in the above-entitled cause until the hour of two o'clock p.m. this date, Monday, May 10th, 1954.)

Mr. Tiedeman: Your Honor please, at this time on behalf of Defendant Lotz, I would like to present an amended counterclaim for filing.

The Court: Have both sides been served?

Mr. Garrison: Yes, we have.

We are compelled to object to the filing of any amended counterclaim, Your Honor. Apparently Counsel is not aware that this matter came before Your Honor previously, and on December 10th, Your Honor made an order dismissing the amended first counterclaim without leave to amend.

This matter was thoroughly argued before Your

Honor on a number of previous occasions and the Defendant Lotz given a number of opportunities to amend this counterclaim and they were never successful, and Your Honor finally ruled finally, the matter was taken up to the Circuit Court and Your Honor was affirmed.

There is a counterclaim still in the pleadings which Your Honor permitted to remain there. But this one has been argued so many times that I hesitate to go into it again. We filed an extended memorandum of the law with Your Honor setting forth the several grounds upon which this counterclaim must fall, one of which, and I think the one Your Honor commented on in one of Your Honor's orders, was that the [565] counterclaim attempts to set up an agreement which wasn't to be performed within one year, but which admittedly was not reduced to writing. So that I hesitate to go into a long argument on that.

The point now is that, right here in the middle of the case, to come now to seek another amended counterclaim that Your Honor has ruled was dismissed without leave to amend, seems to me totally tardy, and I would submit our objection upon the memorandum previously filed, with which I am sure Your Honor is familiar.

The Court: Do you wish to submit it now?

Mr. Kakures: Your Honor, just a few words: It is correct the record for appeal from Your Honor's order was not dismissed by the Circuit Court

but that Court held the appeal was not in order until this matter was first heard.

As I understand the objection raised to Mr. Dusky's first counterclaim on behalf of the defendant Joe Lotz was the fact that Mr. Dusky had pleaded assignment and also alleged that the plaintiff made promises, whereas on the face of the assignment there were no promises on the part of the defendant.

So far as the Statute of Frauds is concerned, we are pleading a matter which is substantiated by a number of California cases, that the plaintiff is estopped from asserting the Statute of Frauds when there is no oral agreement [566] entered into between the parties, and where the plaintiff relies on that promise and changes his position, and because of the conduct of the plaintiff, or the party asserting the Statute of Frauds, that the Courts, in order to have Justice prevail and equity, will not allow the plaintiff to assert the Statute of Frauds.

It is on those cases we are submitting this matter to you.

The Court: Well, did Counsel make a correct statement, that I sustained the objection without leave to amend?

Mr. Kakures: Yes, he did.

The Court: In what particular is this amended complaint differentiated from the one I ruled on?

Mr. Kakures: That one, I believe, Your Honor—I am not too familiar with the first one, but as I

understand it I think Counsel raised two points. One was the Statute of Frauds and the other was that there were no promises on the part of the plaintiff.

The Court: Submit the matter?

Mr. Kakures: Yes, Your Honor.

The Court: The motion to amend will have to be denied. Proceed. [567]

JOSEPH L. LOTZ,

one of the defendants herein, recalled as a witness on behalf of the plaintiff as an adverse witness under Rule 43(b) of the Federal Rules of Civil Procedure, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as hereinafter indicated:

Cross Examination

Mr. McCallum: Q. Mr. Lotz, you remember going to the Central Bank around August 22nd, 1951, with Mr. Hart and Mr. Smead? A. Yes.

Q. And you remember that was the time when the agreement was signed that has been introduced here as Plaintiff's Exhibit 17? A. Yes.

Q. The agreement to appoint Mr. Smead to report to American Plan? A. Yes.

Q. Following this meeting at the Central Bank, did the Central Bank call upon you to obtain some written authority showing your authority to endorse checks——

(Testimony of Joseph P. Lotz.)

A. (Interposing) About the same time.

Q. Just about that same time you remember writing to Mr. Hatfield, don't you? [568]

A. Yes.

Q. I show you what has been marked Plaintiff's Exhibit 1, which bears date of August 27.

A. Yes.

Q. Didn't you write to Mr. Hatfield shortly after that meeting at the Central Bank at which Mr. Hart was present? A. Yes.

Q. Thank you. [568-A]

Mr. McCallum: After you wrote to Mr. Hatfield you went over to the Anglo Bank, didn't you, Mr. Lotz? A. Yes.

Q. Do you recall about when that was you went to the Anglo Bank?

A. About the end of August—30th or 31st.

Q. August, 1951? A. Yes.

Q. And you went there for the purpose of opening a trustee account, didn't you? A. Yes.

Q. And at that time you told the man you were speaking with that you were going to deposit checks made payable to Mid-States Insurance Company?

Mr. McKinnon: If the Court please, I would like to object to this line of questioning in the absence of any statement from Mr. McCallum as to its purpose.

At a previous phase of the trial we entered into a stipulation, and some testimony was introduced subject to motion to strike, the subject being this: that in the suit Mid-States against Anglo Bank, the

(Testimony of Joseph P. Lotz.)

Anglo Bank maintained by its answer that Mr. Lotz had authority of Mid-States to endorse its name on the checks. The case was tried before Judge Harris, submitted, and there are forms of stipulated judgment. Judgment by agreement between the parties was entered in favor [569] of Mid-States Insurance Company.

Now, I would like to inquire whether the purpose of these questions of Mr. McCallum is to prove a case against a bank, but which case he so stoutly resisted during the trial? If the Court please, I can see no point involved because we never meant to try a case against the bank as the matter stands.

The Court: Indicate for the purpose of the record the purpose of the offer.

Mr. McCallum: Yes. I am not trying to try the so-called Anglo case.

The purpose of this testimony is to establish before the Court that this gentleman made certain representations to the Anglo Bank which he knew to be false and untrue, and as a result of those he obtained possession of funds made payable to the Mid-States Insurance Company, all as part and parcel of a plan to obtain funds for the purpose of paying the indebtedness of Mr. Lotz to the American Plan Corporation.

It does not go to the question or issues as to whether or not he had implied authority, or authority by estoppel or authority by negligence to endorse checks, but goes to the principle of the direct representations the man made, and a third person was

(Testimony of Joseph L. Lotz.)

injured, by carrying out a plan to obtain funds belonging to the Mid-States Insurance Company for the purpose of paying the American Fidelity or American Plan Companies. [570]

Mr. McKinnon: Then, if the Court please, we object to the question and object to the entire line of questioning on the ground that it conflicts diametrically to the position taken by the bank in the trial of Mid-States versus the bank. The issue has not been adjudicated, and there has been a stipulation entered, and we submit the evidence is totally immaterial and irrelevant in this proceeding.

The Court: I will allow the testimony to go in subject to motion to strike and over your objection.

Mr. McKinnon: All right.

The Court: I will give counsel a record.

Mr. McKinnon: All right. Will you read the last question?

Mr. McCallum: It was that he went there for the purpose of opening a trustee account.

Q. And at the time you opened the account, Mr. Lotz, you told the bank you were going to deposit checks made payable to the Mid-States Insurance Company, didn't you?

A. And other companies.

Q. And other companies, yes. And did the man from the Anglo Bank ask you if you had authority to endorse checks made payable to Mid-States Insurance Company? A. Yes.

Q. And you told him you did, didn't you?

A. Yes.

(Testimony of Joseph L. Lotz.)

Q. And you subsequently received a letter from Mr. Hatfield, [571] which is marked Plaintiff's Exhibit No. 2, did you not?

Mr. Garrison: Isn't that Intervenor's No. 2?

Mr. McCallum: Yes.

Q. Did you receive it on or about the date it bears, namely, September 5th, 1951?

A. Yes.

Q. And did you receive a subsequent letter from Mr. Hatfield, which is marked Intervenor's Exhibit No. 3? A. Yes.

Q. Did you receive this on or about the date it bears, September 10, 1951? A. Yes.

Q. Did you advise anyone of the Anglo Bank, Mr. Lotz, that you had received those two letters?

A. No.

Q. Did you ever advise them you had not authority to endorse checks made payable to Mid-States?

A. No.

Q. After you received the two letters which I have just exhibited to you, you continued to endorse checks made payable to Mid-States and deposited in the Anglo Bank, didn't you? A. Yes.

Mr. McCallum: No further questions. [572]

Cross Examination

Mr. Bronson: Q. Mr. Lotz, it had come into evidence earlier in the case that your agency for Mid-States started in May, 1947? A. Yes.

Q. And who was the party that you made those

(Testimony of Joseph L. Lotz.)

arrangements with and entered into the contract of agency? A. Mr. Marvin Donnelly.

Q. And you knew him to be, I presume, what has been described as a vice-president of Mid-States.

A. He was state general agent.

Q. He was California or Pacific Coast representative? A. Yes.

Q. And did you know he had a title of vice-president of the company?

A. I don't remember that he was vice-president, but he was a high authority.

Q. All right.

Mr. Garrison: I move to strike that on the ground it is a conclusion of the witness.

The Court: "High authority" may go out.

Mr. Bronson: Q. Did you have any discussion with Mr. Donnelly on the subject of what capital or assets or finances you had or not in taking on this business?

Mr. Garrison: Pardon me one moment, Your Honor. If the [573] Court please, we object to the question on the ground that it is incompetent, irrelevant and immaterial; attempts to vary the terms of a written instrument.

The charge here is that these defendants in the year 1951 committed certain acts which created a loss in the plaintiff and they are responsible for that loss because of those acts.

At the time these acts were performed, these parties, Mr. Lotz and the plaintiff, were operating their business together under a contract that was

(Testimony of Joseph L. Lotz.)

negotiated by Mr. Lotz and Mr. Hatfield and Mr. Titus in August, 1951. That contract is in evidence. It is very complete and it is very explicit, and it was in effect at all times that this alleged conspiracy occurred.

What occurred in 1947 under some other contract, what occurred some time in 1948 or 1949 or 1950 respecting what Mr. Lotz' arrangements might have been at that time, I submit would be not only incompetent, irrelevant and immaterial as to the issues now pending before this court, but would also attempt to vary the terms of a written contract which was executed some four or five years subsequent thereto.

Mr. Bronson: Our position is very simple. To start in, a proposition with the authority and consent and knowledge of an officer of the company, that I referred to as "kiting", and they kept it up continuously during the several changes of the contract, and finally into and beyond the time of the [574] execution of this contract counsel is referring to.

I had the temerity here, Your Honor, to briefly go into the historical aspects of the thing as a predicate to show the same arrangement was continuing to and beyond the contract—to and beyond the time of the last contract. There wasn't any change in the contract.

The Court: Read the question, Mr. Reporter.

(Question read.)

(Testimony of Joseph L. Lotz.)

The Court: The objection will be overruled. He may answer.

The Witness: Do I answer?

The Court: Yes.

The Witness: A. Yes.

Mr. Garrison: May the evidence go in subject to the motion to strike?

The Court: Yes.

Mr. Garrison: And may my objection that I have made run to all questions dealing with acts, events and conversations occurring prior to August of 1951?

The Court: The record so shows.

Mr. Bronson: Prior to August, 1951?

Mr. Garrison: Yes.

Mr. Bronson: You stepped over that line a good many times yourself.

Mr. Bronson: Q. At any rate, what discussion did you have [575] with Mr. Donnelly, remembering you are not bound to give the exact words, but at the time that the contract was entered into in May, 1947, what discussion was there on the subject of your finances in the financing of an agency for Mid-States?

A. Both my son and I were interested in this. My son was with me when Mr. Donnelly made a trip from Los Angeles to see us. We were not very well acquainted with this type of operation, so we mentioned we had no capital, no money, so he told us about the float.

(Testimony of Joseph L. Lotz.)

He said, "You have got this length of time to pay your bills", and he says, "You are using the company's money. That is the way the deal is set up." And that is where we got our thought about this time that elapses between the time we made these applications and the bill from the company.

For instance, if we got some business in January we had the rest of that month and maybe 30 or 60 days of the succeeding months to pay, and that was a continuous program. We had that intervening time of accumulation to pay.

Secondly, we had this money that we sent back there to Chicago earning some money, so that every month, for instance, if our—. Take as an illustration, if the premium was \$100, 85 per cent of that money was ours in a reserve, and one half of that, approximately, was credited to us in January, February, March. So there was a continual buildup there and we had money earning there, and this time element, and that was the [576] factors that would enable us to continue.

Mr. Garrison: Pardon me, is this part of the conversation? If it isn't, I object to it and ask that it be stricken on the ground that it is a volunteer statement by the witness. I thought he was telling about a conversation with Mr. Donnelly in 1947. If he digressed from it, I will ask that it be stricken.

The Witness: A. That was the point Mr. Donnelly was trying to have us understand, that we were working on this time element, and to use an illus-

(Testimony of Joseph L. Lotz.)

tration I took January so that it would be simpler, and that period was called a float.

The Court: Do I understand that this was a conversation you had with Mr. Donnelly?

A. Yes, and my son.

Mr. Bronson: Q. As I understand you, that conversation or explanation from Mr. Donnelly came as a result of your protest that you didn't have money of your own to carry on delayed operations like that.

A. We were ready to throw it out because we had no money.

Q. All right. Now, Mr. Donnelly, did he visit your place of business thereafter from time to time?

A. Yes.

Q. How frequently, as you would average it out, would he come and visit you and talk about the state of the finances and the state of your business?

[577] A. Every two or three months.

Q. When you use the term "float" did Mr. Donnelly introduce you to that term the first time?

A. That is where we first heard about it.

Q. And made it plain to you you were floating on the funds that were due to the Mid-States and were held by you for a period of time in your own hands?

A. That is right.

Q. You had your own office expenses of operation, did you not?

A. At that time my son and his wife helped me for nothing. We tried to get this thing going.

(Testimony of Joseph L. Lotz.)

There were no expenses outside of one desk, about \$10 a month.

Q. Subsequently your office grew to about how many employees at the largest?

A. I think there was a time when we had approximately forty, possibly a few more, employed in my office.

Q. During the year 1951—just to go on ahead a little bit—during the year 1951 can you estimate for the Court what percentage of your gross premiums it cost you to run your office? I am specifically taking it down to the time when you were writing for both Mid-States and American Fidelity and Casualty.

A. Yes. It was a little bit high.

Q. What percentage of gross premiums?

A. I can't tell you that exactly, but I think it was around maybe 16, or 17, possibly 18 per cent. May I add just a little [578] bit more?

Q. If it is explanatory, you may.

A. We were at the time in the process of reducing commissions and cutting our overhead and making readjustments, very substantially. We were checking accounts that weren't showing any profit and had eliminated some, so due to the big volume we were doing we were going through that procedure.

Mr. Garrison: Can we have the time fixed when the last voluntary statement refers to?

Mr. Bronson: Q. He wants to know if you can fix the time when you were doing that? What year was it, or what part of the year?

(Testimony of Joseph L. Lotz.)

A. This was in 1951.

Q. You brought up about—at least there was brought up the question of agents' commissions. Referring to the same time, what agents' commission were you paying as an average matter on your business for these two companies?

A. I think our average commission was about 27 per cent.

Q. During this period of time—I am referring specifically to 1951—did you have occasion, Mr. Lotz, at some time, or from time to time, to check out funds from the trustee account into your operating account for the purpose of accomplishing this float? A. Yes.

Q. And then on some occasions when you were paid commissions, [579] money that was coming to you were collections that you put in your operating account, transferred back from your operating account into your trustee account? A. Yes.

Q. Isn't it a fact that at least during that year both of these companies were principals of yours, and during which your business had increased so seriously, and funds were going back and forth between your operating account and your trustee account from time to time? A. Yes.

Q. You maintained one trustee account, is that true? A. Yes.

Q. And the premiums from Mid-States and from American Fidelity and from West America and National Automobile, Traders and General, and the

(Testimony of Joseph L. Lotz.)

companies you have mentioned here were put in that trustee account? A. Yes.

Q. And they were not separately earmarked?

A. No.

Q. So that when you checked out money to build up your operating account, taking it from the trustee account for that purpose, you were simply using or withdrawing on those commingled funds there?

A. Yes.

Q. And when on other occasions when your operating account was [580] up and your trustee account down, and for some reason by necessity of your office you wanted to build up your trustee account, you took funds out of your operating account and you placed them over without any earmark into the trustee account, is that true? A. Yes.

Q. You started in with a 25-day settlement period under this first contract, do you recall that? In other words, you were supposed to make settlement with the company on premiums collected in 25 days from the end of the month in which the business was written? A. Yes.

Q. Do you recall that? A. Yes.

Q. And thereafter the Mid-States, during the course of your representing them, increased that settlement period to 60 and finally 75 days in the summer of 1951, is that true? A. That is right.

Q. And during the period—Mr. McKinnon reminds me what I should make plain, that at least on the first October contract the Mid-States Company reverted to a 60-day period in the contract

(Testimony of Joseph L. Lotz.)

dated September 1st, 1951. I will merely add that as a comment. Do you remember that to be a fact?

A. I don't remember the date, Mr. Bronson.

Q. Assuming that you settled for all the business written in [581] a different month at a certain number of days after the close of that month, and assuming that the business comes in more or less equally during the month, and assuming that Mid-States was owed the month for which the settlement is made—. Strike that.

In any event, an additional month or only one day? A. That is right.

Q. It added to the period that the company cedes to you as a settlement period, is that correct?

A. Yes, that is correct.

Q. Did you ever have occasion during the months and years following the beginning of business with Mid-States, that is, May of 1947 and up until the first of 1951, to discuss from time to time with Mr. Donnelly or his successors the matter of this float?

A. I discussed it with Mr. Donnelly several times, and my son discussed it with him. I think I discussed it with Mr. Cass, too.

Q. And was that at intervals from time to time during that period I mentioned?

A. I think so, yes. Might I make an additional remark, Mr. Bronson?

Q. I beg your pardon?

A. I have one additional statement with reference to this. Mr. Cass told me over the phone that

(Testimony of Joseph L. Lotz.)

this money that represented [582] the money reserve in Chicago, or wherever it was, always was there to balance any shortage that might exist because I paid out advanced commissions, because this money back there, less 15 per cent, was really funds of my own, of which we were paying these contracts on a yearly basis, one half of it should be paid to us less cost of adjustments and the losses.

Q. You gave testimony on this subject in the proceeding before the insurance commissioner, did you not? A. Yes.

Q. Referring to the same period, or in the year 1947, didn't you testify before the insurance commissioner as follows:

"Question: And just what was the substance of the conversation relative to the money issue?"

The date mentioned on the same page, page 59, is September, 1947.

"Answer: Well, I told him I didn't understand how I could operate without capital."

This is the conversation with Mr. Donnelly.

"So he gave me the thought on retrospective, and he says, 'I will pay your old account with money from the new business coming up.'"

Sort of credit following the reserve which you had with the company.

"Question: Did he have a name for it?"

"Answer: He called it the float.

"Question: That is a revolving float? In [583] other words, Donnelly knew you didn't have any money or capital?"

(Testimony of Joseph L. Lotz.)

“Answer: Yes.

“Question: So he told you you could operate on the float or the credit, whichever it is?

“Answer: That is right.

“Question: Did he tell you about what the credit or so-called percentage would be insofar as paying the bills with Mid-States was concerned?

“Answer: The time element was, at that time was 60 days after the completion of the month in which the business was written.”

Mr. Garrison: If the Court please, I object to counsel reading testimony from some proceeding in the insurance commissioner's office which doesn't apparently impeach Mr. Lotz, is simply repetitious and apparently read for the purpose of emphasis. And I submit that unless he is going to impeach Mr. Lotz with contradictory statements, reading from a transcript in a proceeding where we were not represented or present is simply done for the purpose of assuming some emphasis of the evidence.

I think counsel ought to either impeach in the normal way or not read supplementary matters on the same subject.

Mr. Bronson: I don't know, he may be an adverse person as to us. He is not my client, in any event, and any statement [584] that may apply to the insurance commissioner's proceeding—. But it certainly come in connection with what I am about to offer now.

Do you want to make a motion to strike?

(Testimony of Joseph L. Lotz.)

Mr. Garrison: I did intend to make a motion to strike.

Mr. Bronson: Well, I will wait for it.

Mr. Garrison: And particularly to suggest that further reading from the transcript of the insurance commissioner's office on matters which do not contradict the present testimony shouldn't be indulged in.

Mr. Bronson: Well, I will take counsel's scolding. I suppose you want to make a motion to strike all the answer?

Mr. Garrison: No, it is all right.

Mr. Bronson: All right.

Q. Did you give this testimony at the trial of the so-called bank case in May of last year? You were being questioned by Mr. McCallum.

Mr. Garrison: What page are you reading from?

Mr. Bronson: My notes must be in error—or, rather, Mr. McKinnon's. Oh, I have the wrong book.

(Colloquy off the record.)

Mr. Bronson: Q. Here, Mr. Lotz: Referring to Mr. Donnelly, top of page 6 of the transcript:

"Mr. Garrison: And when did that take place?

"Answer: Well, that must have been some time [585] later.

"Question: Still in the year 1947?

"Answer: Yes."

This is Mr. McCallum's examination of Mr. Lotz:

"Question: And you say your son Jack and you were present?

(Testimony of Joseph L. Lotz.)

“Answer: Yes, I think he was in my office.

“Question: Anyone else present?

“Answer: I don’t think so.

“Question: What took place then? What did you say and what did he say?

“Answer: We told him we had no money and he said, ‘Well, you don’t need any money. You are operating on our money.’ And he says, ‘You have this float which gives you so much time to pay your bill. In the meantime you are getting commissions and other money in checks from the company every month. That is the way this thing works. It works on what we call a float.’ ”

You gave that testimony, Mr. Lotz?

A. Yes, sir.

Q. That is correct, isn’t it?

A. That’s right.

Q. Going to another subject, now. Well, before we leave that, referring to the year 1948, 1949 and 1950, did you continue to [586] operate on the float basis? A. Yes.

Q. Did you ever get any protest from the company? A. No.

Q. You were in court, were you not, when I read certain dunning letters that were written to you by different officers of the Mid-States during the years—especially the years 1950 and 1951?

A. Yes.

Q. And those were times when you were late in paying at the very end of the credit period which the company allowed you to float on? A. Yes.

(Testimony of Joseph L. Lotz.)

Q. And how far behind in the year 1950 or in the year 1951, behind the furthest extension of the full period did you get from time to time?

A. It is impossible for me to tell exactly, but we were late maybe sometimes a week or two, something like that.

Q. How long?

A. Sometimes a week or two.

Q. Did you get behind as long as 30 to 60 days, Mr. Lotz?

A. Not behind the real extension, no, I don't think so.

Q. In the year 1951, with increasing business, you went to Chicago, did you not, in May, and talked to the officers of Mid-States there about extending your float period? [587]

A. I didn't go to Chicago in May. That was in August.

Q. You went to Chicago in August? Were you back there in May? A. No.

Q. No? Had you ever talked to any officer of Mid-States in Oakland about extending the float period?

A. I thought that I mentioned that to Mr. Hatfield at one time.

Q. When you went back there in August 1951, when you had just been in New York the day before, did you discuss an extension of the float period then? A. Yes.

Q. And did they consent to that request?

A. Yes.

(Testimony of Joseph L. Lotz.)

Q. At the same time you talked to them about reducing the company's retention of a percentage of that premium, did you not? A. Yes.

Q. And did they make that concession to you?

A. Yes.

Q. Was that in August, also? A. Yes.

Q. Had that been discussed with any officer of Mid-States Insurance Company here or there prior to the time they made you the concession when you were there in August?

A. I don't think anything previous to that, or any definite [588] proposal was mentioned, although there may have been a casual remark; but the first real discussion we had, I think, was in Chicago.

Q. Yes. They notified you from month to month what your loss ratio was? You heard the testimony of Mr. Hatfield? He says they called you up about the 15th of each month covering the month preceding, with each agent they had, among them you. Did they ever tell you what your loss ratio was running, according to your recollection?

A. I think at times we got some information, but not consistently every month.

Q. But they did tell you when your loss ratio was getting high, didn't they? A. Yes.

Q. Let me get at this: Wasn't the agreement on their part to reduce their participation in the \$1 or gross premium from 15 cents down to 14 cents so that you could come out with more profit on the deal and offset your loss ratio?

A. I imagine it was, yes.

(Testimony of Joseph L. Lotz.)

Q. Wasn't that the reason you asked them to reduce the amount on down so that the amount they reduced it would help you in the deal? A. Yes.

Mr. Garrison: That is objected to on the ground the document is the best evidence and speaks for itself, and his [589] conclusion would be a conclusion.

The Court: So far as the record goes there is nothing in the testimony in relation to 14 cents or what not.

Mr. Bronson: This is the first time.

Mr. Garrison: It was Mr. Hatfield said in his testimony he insisted——

The Court: Proceed.

Mr. Garrison: I have no objection to him going into it, but not the conclusion. If he wants to test his testimony, I certainly would have no objection, but the document speaks for itself.

Mr. Bronson: We are not talking about the document. Mr. Hatfield gave his story. I want Mr. Lotz' story why they chiseled another one per cent, and he is entitled to give it.

The Court: Proceed.

Mr. Garrison: Who chiseled the one per cent? Mr. Lotz?

Mr. Bronson: Yes.

Mr. Garrison: He can give the conversation, but his conclusion is something Your Honor has to draw, it seems to me. I do have a motion to strike his answer pending based on that objection.

(Testimony of Joseph L. Lotz.)

The Court: I don't recall it. Please read the question and answer, Mr. Reporter.

(Question and answer read.)

The Court: Let the question and answer stand.

Mr. Bronson: Q. Do you recall a discussion with Mr. Hatfield some time early in 1951 when there was discussion of how much you were paying sub-agents as commission?

A. I think so, yes.

Q. Do you recall throwing some of your own funds into one or the other of your bank accounts maintained for the Lotz Agency in that year?

A. In 1951 or 1950?

Q. You tell me the year it was. Didn't you put some funds of your own in there?

A. I put every cent I could get at that time in those funds. At one time I borrowed on my insurance, in the early stages, and another time I had a small inheritance of about \$700, my stepfather died, and I put that into my trustee account.

Q. Did you tell Mr. Cass or Mr. Hatfield or any other officer of the company about those invasions you made of funds into your agency accounts?

A. No.

Q. Coming down to the meeting you had with the Mid-States people in August—I am just referring to it for any refreshment of your memory it might be—Mr. Smead says that he phoned you in Chicago. He had flown out here directly to accompany you to Chicago on the August visit, 1951, and that he called you about the Public Service underwriting

(Testimony of Joseph L. Lotz.)

or rewriting, and asked you to mention it to the Chicago people. [591] Do you recall him telling you that? And he also added you responded in a telephone conversation and said you would do that?

A. This conversation with Mr. Smead was on the last evening before I left Chicago. We had finished with Mid-States, so I don't know of any occasion to go back because I was getting out of there that evening.

Q. Well, it is your testimony you made no reference to it? A. No.

Q. To those people?

A. I told them—do you want to know what I told them?

Q. Yes.

A. I told them I could write a large volume of business, and I told them it would be difficult for me to shoulder all of it, so they granted me that 15 per cent for a temporary measure until I got caught up.

Q. Mr. Lotz, referring to your business generally, there has been reference made here to some of these companies, to used car lot dealers and to new car dealers, these people being numbered among your sub-agents. A. Yes.

Q. Those sub-agents have their own licenses to sell insurance, issued by the insurance department of the State of California, is that right?

A. Yes. [592]

Q. Now, the insurance that is written by those

(Testimony of Joseph L. Lotz.)

particular types of installations is the so-called physical damage automobile insurance, is it not?

A. Yes.

Q. And referring to the year 1951, during the period you were representing both these companies, plaintiff and defendants here, what percentage of your gross premiums came from that kind of business?

A. Oh, the vast majority. It was practically——

Q. Practically all, wasn't it?

A. Yes, practically all of it.

Q. Now, when these officers from the company would come up from Los Angeles and to their local officers here and spend a day or two in your agency, wasn't there discussion where your business was coming from, where the source of it was from?

A. Yes.

Q. And then your dailies they went through, would they make any indication of the source of your business? They don't give the source of the business, do they? They only give the name of the assured, the address and occupation, and so on.

A. Also usually lists the agent on the bottom of the application, where it come from, yes.

Q. Is that shown on the daily? A. Yes.

Q. When these people came to your agency, Mr. Donnelly while he was there and Mr. Cass during the period he was there, and whoever followed him, would you make available to them anything they asked you to see—— A. Yes.

Q. ——of their records? A. Yes.

(Testimony of Joseph L. Lotz.)

Q. Would they question you about the source of your business and about how you were working, and all these various questions that the company you were representing would be interested in?

A. Mr. Cass came in, the first thing he would do, he would take off his coat and grab promiscuously at a certain number of dailies and check them to see if our underwriting procedure was in line with their ideas.

Q. There are certain types of business of that character that are less desirable than others, such as soldiers? A. Yes.

Q. Orientals? A. Yes.

Q. Negro people. And would your dailies make a showing of that particular thing?

A. Yes.

Q. And Mr. Cass would, when he had finished with his coat off going through things of that kind on his own, would he then discuss it with you?

A. Yes.

Q. Criticize it?

A. Yes. Recommendation.

Q. Or recommend, or what not? A. Yes.

Q. How long would his visits last ordinarily?

A. Oh, he would look at those dailies for a day or two.

Q. Mr. Hatfield said he came up on an average of once a month. Would your recollection be about the same as that?

A. Who came once a month?

Q. Cass. A. Oh.

(Testimony of Joseph L. Lotz.)

Q. Whoever came down, whether Oldberg, Cass, whoever it would be, would visit you about once a month?

A. Oh, that was in the later stages. Mr. Oldberg, he was working in Los Angeles. He came about once a month or so.

Q. When Mr. Oldberg came up there did he follow more or less the same technique that Mr. Cass did about going into your records without your help and did he, following that, discuss his findings with you?

A. Mr. Oldberg wasn't as well versed in underwriting as Mr. Cass and he was unable to recommend too much because I think he was in a different capacity. He was new out here and we helped him quite a bit.

Q. You helped him? [595]

A. We helped him get his bearings on this stuff.

Q. There has been some reference to substandard business, the company's attempt to offset substandard business such as certain classifications of assureds by rating structure to permit them to make more out of them, isn't that right? A. Yes.

Q. Did you have any business turned down by Mid-States that you produced from time to time?

A. I don't think so.

Q. And what was your rate scheme there by comparison with the manual rate on this business that wasn't standard?

A. Well, sometimes—for a time when I first started we had a rate two to two and one-half times

(Testimony of Joseph L. Lotz.)

higher than the manual. I think that general policy in the later time when we were operating, I think we had a formula of about seventy per cent manual, and that would also include some of the policies, what they call the "drive-your-own-car," and so forth, and the various things that might bring up the total amount.

Q. In other words, at the start if I got a certain coverage it would cost me \$50.00 in there, assuming I am a standard risk? A. Yes.

Q. Which I don't think you are justified necessarily in assuming. But these other things would go as high as two and a half times that? [596]

A. Yes.

Q. Or up to \$250.00 for that amount of coverage? A. Probably not quite that high.

Q. Later on it was reduced to something about seventy per cent above the manual rates?

A. I think that is about correct.

Q. Now, referring to the time when American Fidelity and Casualty Company came into this picture, did you hear from Mr. Hatfield on the subject of increasing your business with their company?

A. Yes, they wanted my business increased.

Q. Did you hear any protest from Mr. Hatfield or the field representative here about sharing the business with American Fidelity and Casualty.

A. Not directly. They were after more business, that is all.

Q. Coming down to the conversation in August when you were in Chicago, did Mr. Hatfield or Mr.

(Testimony of Joseph L. Lotz.)

Titus or anybody there encourage you to write more business with their company? A. Yes.

Q. Do you recall a conversation with Mr. Hatfield and Mr. Titus present while you were there and reference being made by either one or both of them to you as being in trouble? A. Yes.

Q. Well, state to the Court what you recall of that conversation. [597]

A. Mr. Titus said to me, he says, "Joe, you are in trouble." He says, "We will help you."

Q. Was there any conversation from Mr. Titus either before or after that to indicate what he meant by your being in trouble?

A. Well, previous to that we were discussing policy of the business and Mr. Hatfield was trying to be conservative, telling me he didn't think I should write over possibly forty or fifty thousand a month, but Mr. Titus says, "we will take all you can write," but he says, "we want you to write good business and grade it right", so that's it.

Q. Told you he would take all the business you could write? A. Oh, yes.

Q. Now, weren't you—were you having trouble—strike that. Were they pressing you for settlements at that time of your financial relations with them? A. No.

Q. Was there any comment about the way your loss ratios were running at that time by Mr. Titus or Mr. Hatfield? A. I don't think so.

Q. When he told you that you were in trouble and he would have to help you, was there any state-

(Testimony of Joseph L. Lotz.)

ment made of how or what they would do to help you?

A. No. They were after the contract, I think, and agreement had been completed, and that was just a remark supplementing it [598] later on. Mr. Titus said, "Joe, you're in trouble." He said, "we will help you".

Q. He supplemented the conversations that made up the new agreement by saying, "you are in trouble but we are going to help you out"?

A. Yes.

Q. And what he had written into that agreement by way of additional concessions to you was a fixing of the extension—strike that. Fixing of reduction of the company's retention?

A. Yes.

Q. And also another concession—what was that? He made an agreement for the first time in the history to give you a prepaid commission, did they not? A. Yes.

Q. Was anything said by either of those gentlemen that they were doing it to meet competition?

A. I don't remember that. I don't think so.

Q. Coming down after that, you had a meeting that you have testified to rather fully when Mr. Hart and Mr. Feller were out here, did you not?

A. Yes.

Q. And that was a few days later, around the 20th or 22nd of August, was it not?

A. I think it was. [599]

Q. And counsel has identified a letter. It is

(Testimony of Joseph L. Lotz.)

signed by you and says that in view of the fact that their company will not give a prepaid commission arrangement to you, that the contract is terminated? You know the letter that was shown to you this morning? A. Yes.

Q. Yes. Now, had you in the meeting in New York before you went to Chicago, when you were talking with Mr. Mark Hart and Mr. Feller, had you informed them of any agreement that you had or had in the making whereby you could get a prepaid commission, and asked them to meet it? Do you remember that conversation?

A. When I was in New York? You mean when we discussed this prepaid commission in New York?

Q. Yes. Well, let me put a leading question to you: don't you recall that in that meeting you stated that you could get from the Mid-States an arrangement whereby they would greatly relieve your financial condition by giving you a prepaid commission arrangement of fifteen per cent; and that they told you in response that their contact with the company for which they acted as managers, referring to American Plan, acting as managers for American Fidelity under that contract they couldn't give you a prepaid commission?

A. I tried to get a prepaid commission from Mr. Hart, that's right. In New York, you mean? [600]

Q. Yes.

A. Yes. But he said he couldn't give it to me, that's right.

Mr. Bronson: If I had a few minutes to look at

(Testimony of Joseph L. Lotz.)

my notes I would probably go a little faster, Your Honor.

The Court: Take a recess.

(Short recess.)

Mr. Bronson: Q. Now, Mr. Lotz, on the subject of Mr. McCallum's examination of you, is it true that in the early part of 1951, along about February, Mr. Hatfield came to your office and you showed him a stamp that you used to endorse the premium checks with? A. Yes, I——

Mr. Bronson: I am going to interrupt my question and call his attention to some statement he made at the insurance commissioner's hearing. It is underscored on page 79 of that proceeding and goes over to the next five lines.

Mr. Bronson: Q. Will you read that, Mr. Lotz, and don't answer the question further? Does that serve to restore your recollection on that subject?

A. I think they knew that I was using a stamp.

Mr. Garrison: May I see it?

Mr. Bronson: (Handing document to Mr. Garrison).

Mr. Bronson: Q. And did you understand during all the conduct of this business during 1951 that you had authority from Mid-States to endorse the checks by the use of the rubber [601] stamp that you have mentioned?

Mr. Garrison: That is objected to on the ground that what he understood would be a conclusion of his, and I submit he would have to confine it to conversations with officials of Mid-States.

(Testimony of Joseph L. Lotz.)

The Court: The objection will be sustained.

Mr. Bronson: Q. Did you in fact continue to use the stamp and endorse the premium checks that came in for these two companies in 1951?

A. Yes. [602]

Q. And were you using it at the times the various officials, Mr. Cass or Mr. Oldberg or others, came in there while your business was being conducted, and while they were going through your records in the manner you have described?

A. Yes.

Mr. Bronson: To supplement the statement made by Mr. McKinnon to Your Honor in the argument on the admissibility of certain evidence when Mr. McCallum was questioning the witness, I want to read from page 30 of the transcript of the trial of the bank case. It is the bottom of page 30.

"Mr. McCallum: Well, my view, Your Honor, is that there was no supervisory control maintained over this man at any time during the time he was representing the company. They weren't concerned what this man was doing with the money he handled as long as he got the monthly statements paid. How he operated it they weren't concerned with. That will be the position we are endeavoring to maintain."

And I comment he was representing the same defendant he is now.

Mr. McCallum: I make a motion to strike this. This is not testimony. It is an argument I made

(Testimony of Joseph L. Lotz.)

before the court, before another court, and my remarks are not testimony.

Mr. Bronson: It wasn't offered for that. Incidentally, [603] it is the same court in the same case.

Mr. McCallum: It isn't testimony.

Mr. Bronson: This is the Northern District, Southern Division, and it is the same court and same case.

The Court: Is this an opening statement?

Mr. McCallum: No, Your Honor, it is argument, apparently, that I made some time during the trial of the bank case.

The Court: Was that your position at that time?

Mr. McCallum: That is right, Your Honor.

The Court: Proceed.

Mr. Bronson: And I will add this from the top of the same page:

"Our position is that they permitted him to do that during the entire time he was their agent, which goes to the supervision and control of the agent."

Mr. McCallum: Pardon me. Does my motion to strike go also, if Your Honor please, to the second statement counsel made?

I find this very irregular for counsel, in the course of examination of a witness, to append something from another proceeding to an argument that was made about an hour ago at the time that I started to examine this witness.

The Court: We have a peculiar situation here confronting us. There was a phase of this case that has been tried by a different department here. [604]

(Testimony of Joseph L. Lotz.)

Mr. McCallum: That correct, Your Honor.

The Court: I am going to allow the testimony in subject to your motion to strike and over your objection. It may or may not become material. I am not prepared to say at this time. But your legal position is protected.

Mr. McCallum: Thank you. But may I just remind the Court that this is not testimony, it is argument that counsel is reading, Your Honor. It is argument.

Mr. Bronson: I offer it as a supplement to my associate's argument. It came a little late, but you can't always put your finger on these things, at the moment you are making the argument.

I put that in on account of the extraordinary change of position Mr. McCallum has gone through.

Mr. Bronson: Q. Now I will ask you, Mr. Lotz, if you testified—I am reading from page 31 of the transcript of the bank case—as follows:

“Question: (By Mr. McCallum): Mr. Lotz, whenever you wrote insurance, did you ever clear it with Mid-States Insurance Company before you wrote the insurance?

“Answer: Did I what?

“Question: Ever clear with them or get permission to write insurance before you wrote the policy?

“Answer: No. No, I operate almost as a company, with full authority. I had a right to reject or accept any applicant and I operated on that basis. I operated almost the same as a company with full power to do about anything we wished.

(Testimony of Joseph L. Lotz.)

“Question: Did you at any time during the entire period from 1947 to the end of 1951 ever get their advance approval before you wrote any insurance?

“Answer: No.”

You made that?

A. That's right.

Q. And that is true, isn't it?

A. That is right.

Q. Now referring — there's a little jumping around here for which I apologize, but I am referring back to the trip you made to Chicago following your visit to New York, both being in the middle of August, 1951:

When you got to Chicago isn't it true that you told both Mr. Hatfield and Mr. Titus you had been to New York and had seen Mark Hart and that you tried to get a better deal in New York and that you had failed? A. Yes. [606]

Q. And isn't it true that when they discussed with you then and there the additional concessions that they were making you, that these others were also added: that they increased your territory to the whole of California, is that right?

A. I think so.

Q. And that they for the first time permitted you to appoint your own agents?

A. I had that privilege previous.

Q. But you had to get an approval previously.

A. Well, I had it before that.

Q. That wasn't a change, then?

(Testimony of Joseph L. Lotz.)

A. No, that wasn't a change.

Q. That was not an additional concession?

A. No.

Q. Regarding the examination that was conducted this morning by Mr. Garrison, I noted that a number of his questions you answered, "That is probably right."

The Court may be interested here, Mr. Lotz, in the difference between your saying, "I remember that happened", and merely for courtesy or whatnot saying, "Such probably happened."

Now, what can you tell the Court in this connection when you say, "That probably happened"? I can't give you all the times you said it here, but were you giving him an actual memory you had or otherwise?

A. I am indicating that to the best of my ability I think [607] those things are correct. But at that time I wasn't myself. I had two big worries: this thing, getting this money in, getting it paid; and, second, physically I was ready for an operation at any time and my nerves were pretty bad, and my wife was also on the verge of a breakdown, so I wasn't exactly on an even keel as far as my mental poise was concerned, so I am unable sometimes to be specific and certain.

Q. Now, are you able with the additional examination as it goes on here to tell us whether or not you had discussed all these concessions that you got by the agreement of September 1st, 1951, that you hadn't already either been accorded them or prom-

(Testimony of Joseph L. Lotz.)

ised them or told that you would get them, before you ever went back and saw the people in Chicago?

I am referring to the 15 per cent prepaid commission, and to the reduction of the company's retention by one per cent.

A. I think that I mentioned that to Mr. Hatfield at some time previous to this, but——

Q. You mean you can't fix the time?

A. I think it was in my office, but it didn't seem to materialize at that time, so then when I was in New York I thought I could make another approach on that.

Q. Yes. But you told Mr. Hart in New York that you had a proposition with Mid-States for a prepaid commission? In other words, a portion of your commission, you would take it out just when you got the money, the 15 per cent. And you [608] mentioned that, you told me just before the recess, and Mr. Hart told you, "Well, we can't do that."

A. Mr. Hart—I asked Mr. Hart for a retention. I mean——

Q. Prepaid?

A. A prepaid, but he would not do it.

Q. Hadn't you already been told you could have that before you saw Mr. Hart?

A. Had I what?

Q. Hadn't you already been told by Mid-States you could get a prepaid arrangement before you saw Mr. Hart?

A. No, not definitely.

Q. Now, referring to this situation that developed out here at the end of November, 1951, when

(Testimony of Joseph L. Lotz.)

Mr. Hatfield was here, I want to ask you if you recall a telephone call——. I am going to change my question.

I am referring to the time immediately before this December 6th statement, the 10-page statement of Mr. Smead's. Do you recall Mr. Mead, your attorney, calling you up and saying that Mr. Hatfield had asked him for an appointment, for you to be there with Mr. Hatfield and get a statement of the facts? A. For the next morning?

Q. Yes. A. Yes.

Q. You didn't go to Mr. Mead's office the next morning, but rather there was a statement that was taken the night before? [609]

A. That is right.

Q. And the next morning you got a call from Mr. Mead, didn't you, some time around eleven o'clock, saying, "I thought you had an appointment", or something like that? A. Yes.

Q. And you informed him that a statement had already been taken? A. Yes.

Q. Referring to the assignments that you executed on the 27th of November—this goes back a few days earlier than the incident I just mentioned—do you recall this: That you had a conference with Mr. Hatfield in Mr. Mead's office, with Mr. Mead present, about the assignments and about the statement that was given that starts in "Of my own free will and accord", and so on? A. Yes.

Q. And Mr. Mead stating to Mr. Hatfield that there wouldn't be any assignments, or there wouldn't be any statement made unless Mr. Hatfield was will-

(Testimony of Joseph L. Lotz.)

ing to assure you and Mr. Mead that there wouldn't be any suits filed? A. Yes.

Q. Do you recall that you were asked by Mr. Mead to step out of the office, and after fifteen or twenty minutes you were called back in and they said, "All right, there will be no suits", in effect, and you thereupon went ahead and executed [610] the assignment that in effect transferred all your business and all your records into the hands of Mr. Hatfield's company? A. Yes.

Mr. Bronson: That is all.

Redirect Examination

Mr. Garrison: Q. Mr. Lotz, as I understand it now, in 1947 you were operating with your son and your wife?

The Court: I think possibly at this time I am prepared to rule on the motion to strike.

Mr. McCallum: Mine?

The Court: Statements of counsel are arguments of counsel and not evidence. Therefore, it will go out. Motion is granted.

Mr. McCallum: Thank you, Your Honor.

Mr. Garrison: Q. In 1947, you say you were operating without any particular overhead, just your son and his wife? A. Yes.

Q. And you had one desk, you say, in an office some place? A. Yes.

Q. And you paid a small amount of money per month for the use of the desk? A. Yes.

Q. I think you said \$10 a month?

(Testimony of Joseph L. Lotz.)

A. Ten or twelve, something like that. [611]

Q. Then as you went on in 1948 and 1949, I assume your business increased? A. Yes.

Q. And as a matter of fact, in 1948 you did a pretty good business, didn't you?

A. It was getting better, yes.

Q. And Mid-States Insurance Company paid you \$24,117 earned commissions in 1948 in cash, didn't they?

A. I think that is about it.

Q. And then in 1949 your business prospered further? A. Yes.

Q. And in that year they paid you \$48,862.78 in cash, earned commissions? You have to answer because the reporter can't see you nod your head.

A. Yes.

Q. And in 1950 you hit your maximum success in business, did you not? A. Yes.

Q. And they paid you that year \$70,685.02 in earned commissions? A. Yes.

Q. In cash? A. Yes.

Q. And in all those years you met your accounts with Mid-States Insurance Company, didn't you?

A. Yes. [612]

Q. You were sometimes late, you say, a week or so? A. Yes.

Q. And they wrote you follow-up letters when you were late? A. Yes.

Q. And that is the letters Mr. Bronson seems to

(Testimony of Joseph L. Lotz.)

delight in referring to as the "dunning letters", is that correct? A. Yes.

Q. And in no instance were you ever late more than a week or two or three?

A. I think that is correct.

Q. In all those years. Now, during that period of time you had a 25-day credit period before you had to pay the statement of the insurance company?

A. I think we had more in 1949 and 1950, it seems. Seems we were longer than that.

Q. Wasn't your contract amended in May of 1950 to give you 75 days?

A. No, in 1950 I think it was stretched to 60. Sixty. Then in 1951 I think it was increased to 75.

Q. 1951?

A. I think that is what it was.

Q. Yes. 25 days up to 1951, May, and then increased to 75, isn't that correct?

A. I can't remember that they had us 25 days at the start.

Q. As a matter of fact, it's common practice in every [613] insurance agency and general insurance agency relationship to have a credit period before the general agent has to meet his payment to the company, isn't it? A. Yes.

Q. That is true whether it be retrospective or in San Francisco, Los Angeles, New York, or elsewhere? A. Yes.

Q. And that is because of the explanation that has been given, that it takes time to collect those funds from sub-agencies, isn't that true?

(Testimony of Joseph L. Lotz.)

A. Yes.

Q. And all these years that you were receiving the substantial commissions you had a trustee account? A. Yes.

Q. Kept your funds separated in the trustee account? A. Yes.

Q. You are not telling this court that you didn't understand the laws controlling insurance agents respecting the maintenance of their principals' funds in a trustee account, are you?

A. No.

Q. You knew that? A. Yes.

Q. And whatever the conversation with Mr. Donnelly in 1947 was, that didn't affect your knowledge of your obligations under the laws of this state and your license as an insurance [614] agent, did it?

A. No.

Q. You receive bulletins two or three times a year from the insurance commissioner's office, do you not, in reference to trustee funds and the obligation of agents? A. Yes.

Q. You know what sections——

Mr. Bronson (Interposing): I doubt if that has any materiality here, Your Honor.

Mr. Garrison: It goes to his knowledge.

Mr. Bronson: It is what he did and what the company did that seals their relationship. Getting letters isn't part of it.

The Court: He gets two or three bulletins from the insurance commissioner?

Mr. Garrison: Every year he receives those dis-

(Testimony of Joseph L. Lotz.)

cussing the duties and obligations as an insurance agent.

Q. You know what 1730 of the Insurance Code is, don't you?

Mr. Bronson: Wait a minute. I had an objection here.

The Court: Let's ponder a moment. What is the purpose of this?

Mr. Garrison: It's just simply to show his knowledge of his obligations.

The Court: He says he knows.

Mr. Garrison: Very well. Maybe I am laboring the point, so I will withdraw the question. [615]

Q. And when you were approached by the American Fidelity and Casualty Company people in 1950, they offered you a better contract than you had with Mid-States Insurance Company, didn't they?

A. I think a longer time extension, I think.

Q. Yes. They were going to give you a credit period of 75 days, weren't they?

A. I think that is right.

Q. And did in fact give you such a credit period, isn't that so? A. Yes.

Q. And shortly thereafter they gave you a guaranteed commission, did they not? A. Yes.

Q. So that no matter what your losses were, they assured you that you were going to at least get 20 per cent commission, didn't they? A. Yes.

Q. And that was the reason that you switched your affections from Mid-States to American Fidel-

(Testimony of Joseph L. Lotz.)

ity and gave them your business commencing in January, 1951, because it was more advantageous for you, did you not? A. Yes.

Q. Now, when you were in New York Mr. Hart told you you were all through with them, didn't he, that you couldn't write any [616] more business in their company on any basis?

A. I think so.

Q. Yes. And it was because of the deplorable financial situation that you reported to them that he said that?

A. It was caused by that check, so far as I could say.

Q. At any rate, you were told in no uncertain terms that you were through with the American Fidelity and Casualty Company, weren't you, and the American Plan?

A. I don't know whether that was originally told to me in New York or whether I received that over the wire.

Q. Well, I will call your attention, Mr. Lotz, to Plaintiff's Exhibit 30, which is a document that you say you signed but which you do not recall having dictated. A. Oh, yes.

Q. And that says—well, read the first sentence, will you please?

A. This was in Oakland?

Q. Yes. But just read that first sentence, please.

A. This is after we were in New York?

Q. Oh, yes, this was after. This was in August—August 22nd. A. Yes.

(Testimony of Joseph L. Lotz.)

Q. It says, "Pursuant to my discussion with your Mr. Hart in New York on August 13th." And that discussion in New York of August 13th was the very cancellation of your contract with American Fidelity and Casualty Company, wasn't it? [617]

A. Let's see, I don't know whether that was definite in New York or not, but I guess it is definite right there.

Q. Yes, sir. And that refers to the New York meeting? A. It does.

Q. And that is the cancellation of your contract that we are talking about? Isn't that so?

Mr. Bronson: As I get the substance of all this long questioning, it is just what the document says. Is there any more than what it says on its face? Or do I mistake your purpose, counsel?

Mr. Garrison: Were you interrogating me?

Mr. Bronson: Yes. You have taken ten minutes now on it and all you have to do is read it again to the Judge. He has heard it three times.

The Court: The document speaks for itself. Let's proceed.

Mr. Garrison: Q. When you went to Chicago you didn't tell Mr. Hatfield you had had your contract cancelled by Mr. Hart, did you? A. No.

Mr. Garrison: Mr. Titus, I mean. I think that is all. Thank you.

Recross Examination

Mr. Bronson: Q. I have one more matter that I think comes [618] most rapidly by asking the witness about his testimony in the bank trial, so-called.

(Testimony of Joseph L. Lotz.)

Page 16. Question by Mr. McCallum:

"Were you present at a conversation at the Central Bank or at your office just immediately prior to the opening of your trustee account in the Central Bank at which Mr. Hatfield was present?"

"Answer: Yes.

"Question: Where did it take place?"

"Answer: On the main floor where Mr.—I think Akron or Crown or something like that has his office.

"Question: Is he an officer of the Central Bank?"

"Answer: Yes.

"Question: Who else was present at that time?"

"Answer: Oh, five or six men there. Smith, Johnson, Hatfield and I. I think Smead. No, I don't know that he was. Hard for me to remember. There were five or six of us there, five or six men. [619]

"Question: Do you remember what was said at that time by Mr. Smith and Mr. Hatfield?"

"Answer: Well, we discussed the general operations and someone asked if I had the power to sign checks, and Mr. Hatfield says, 'yes', and when they asked him if he could give them a statement, he said 'yes', but after that the meeting was over and nothing was done, just passed over."

Mr. Bronson: That's all.

Recross Examination

Mr. McCallum: Q. Mr. Lotz, the incident Mr. Bronson referred to, the matter that has just been read to you, took place prior to the time you opened the account in the Anglo Bank, didn't it? And it

(Testimony of Joseph L. Lotz.)

occurred prior to the time you got Mr. Hatfield's letter of September 5th, 1951, saying he couldn't give you authority to endorse checks?

A. That is right.

Q. And it occurred prior to the time you deposited the Public Service monies in the Anglo Bank account, too, didn't it? A. Yes.

Mr. McCallum: Thank you.

Mr. Bronson: And after that you followed Mr. Hatfield's instructions in the letter precisely and got the agents to make the checks payable to you—same funds, same type of income, [620] right?

A. Yes.

Mr. Bronson: That is all.

Mr. McCallum: You don't mean that you did that in every single case, do you, Mr. Lotz?

A. I was trying to. I was trying to get every agent to make these checks payable to me. That was the recommendation of Mr. Hatfield to overcome this situation.

Mr. McCallum: Well——

A. Let me add one more thing. And the other day, why, Mr. Titus showed a check there from a fellow by the name of Jackson from up in Chico someplace, and we tried to get him to make those checks to me personally, and sometimes he would get a bunch of policies in Traders and General and West American and there might not be a single policy in the Mid-States or in the—this other company, and he would make it all to one company instead of me. We couldn't get it.

(Testimony of Joseph L. Lotz.)

I had no time to run back and get those checks straightened out because the companies wanted money. So I put the stamp on them and deposited them, and I felt the general practice which I had been lead to believe—I was general agent, with all the authority I had, that he could put the stamp on there, because they wanted because they wanted my check.

That's what they wanted. So if I had had to get all them checks straightened out I would have been out of business much [621] sooner. Might have been happier.

Mr. McCallum: Q. Well, Mr. Lotz, do I understand that you took the three checks, the two of Jackson and one of George R. Fulmore, and tried to have them made payable to you?

A. I had men out on the road, yes. They were to see them. I had four men. That was their assignment, to try to get the checks always made payable to me.

Q. I am speaking now of these three particular checks. Did you try to have them made payable to you?

A. I am mentioning in particular this fellow, Jackson, yes.

Q. My question has to do with these three checks. Did you try to get these three checks made payable to you?

A. Oh, I don't recall about those particular ones.

Q. If you looked at them would you know?

(Testimony of Joseph L. Lotz.)

A. No. I never saw the checks. I was away and Mr. Smead and my bookkeeper handled that.

Q. You knew the Public Service checks were made payable to Mid-States, didn't you?

A. I didn't know that until this was completed. I was away. When I came back the whole transaction was completed in my office.

Q. Well, don't you recall, Mr. Lotz—

A. (Interposing): Oh, I signed—yes, pardon me. Yes, that's right, I signed half of them. I had my secretary on four out of the eight, whatever it was. [622]

Mr. Bronson: Do we understand those are checks out, not checks in? Checks from the trustee account over to your AFC account.

Mr. McCallum: I am not clear. I'm trying to get it straightened out.

Mr. McCallum: Q. The checks I am speaking of, Mr. Lotz, are the checks you received from the Public Service Company made payable to Mid-States, and my question is, you knew, didn't you, the Public Service checks were made payable to Mid-States Insurance Company?

A. I didn't know it at the time.

Q. I beg your pardon?

A. I didn't know it at the time.

Q. You did not know it?

A. No.

Q. Do you remember the big check of \$67,500 that came in, made payable to you, and you stopped payment on it and they issued a new one made pay-

(Testimony of Joseph L. Lotz.)

able to Mid-States? You knew about that, didn't you, Mr. Lotz?

A. Do you have that photostat of that check here?

Q. Yes, sir.

A. The endorsement, bears a stamp here. I don't think that I saw that check when it came in. But I probably would have stamped it, anyway. But I was not there when this came in. I don't think I was there. It doesn't show anything, only the [623] stamp of my bookkeeper.

Q. You turned right around, didn't you, and issued a check to American Fidelity and Casualty Company——

A. Yes.

Q. ——which has been marked Plaintiff's Exhibit 19 and bears your signature?

A. That is when I came back, yes.

Q. Did you try to get these checks made payable to you instead of Mid-States Insurance Company?

A. I think we did.

Q. Do you know that, Mr. Lotz, or are you guessing at that?

A. What's that?

Q. I say, do you know that to be a fact, or are you guessing?

A. I am pretty certain.

Q. Who went to Public Service and tried to have those checks made payable to your order?

A. Who?

Q. Yes. Did you understand my question?

A. Yes, yes, I understand the question.

Q. Now, I understood you to say that you

(Testimony of Joseph L. Lotz.)

thought you tried to have the Public Service check made payable to your order? A. Yes.

Q. And I ask you now, sir, who went to Public Service and tried to get the checks made payable to your order?

A. I don't know if anybody went over. I think those were my [624] instructions to Mr. Smead, and whether he went over there or not I don't recollect.

Q. You don't know of your own knowledge whether anyone tried to get these checks made payable to your order, do you?

A. Yes, I think I wanted them made payable to me.

Q. Well, do you know who went and spoke to them about it?

A. I told you I don't know whether anybody went over. I gave orders to Mr. Smead. Whether he went over or called them, or what happened—you don't have to go over to see people to get a check. You call them and they send it to you, don't they?

Q. Was there some reason why, then, you asked Mr. Smead to go to Public Service Company and try to have those checks made payable to you?

A. Because I had orders to have the checks made to me.

Q. Isn't it a fact that it was because they wouldn't take checks payable to you that you talked to them about it? A. I don't know that.

Mr. McCallum: Thank you.

The Court: Step down.

(Witness excused.)

Mr. Garrison: Call Mr. Titus. [625]

RAY E. TITUS

a witness called on behalf of the plaintiff, being sworn to tell the truth, the whole truth and nothing but the truth testified as follows:

The Clerk: State your name, your occupation and your address.

The Witness: Ray Edmund Titus. I am President of the Mid-States Insurance Company.

The Court: How long have you been so engaged?

The Witness: Since March, 1949.

The Court: Proceed.

Direct Examination

Mr. Garrison: Q. Mr. Titus, you knew you had an agent in Oakland, California, by the name of Joe Lotz in the year 1949 and later?

A. Yes, sir.

Q. And when did you first meet Mr. Lotz?

A. August 15, 1951.

Q. In your office in Chicago?

A. I met him first in Mr. Hatfield's office.

Q. And that was at the August meeting that we have been referring to in this trial?

A. Yes, sir.

Q. And did you have a conversation with him there?

A. We had a short conversation there. [626]

(Testimony of Ray E. Titus.)

Q. And then subsequently did you see him again?

A. See, I was having lunch with—a previous engagement that I had with Mr. Kuhn, in his office, and both Mr. Lotz and Mr. Hatfield and myself had lunch with Mr. Kuhn in his office.

Q. Did you then discuss with Mr. Lotz his business prospects?

A. Most of our discussion had to do with his previous experience and his baseball experience and so forth.

Q. But subsequent to that you did get into a discussion of the business organization?

A. Yes.

Q. That was in your office?

A. In Mr. Hatfield's office.

Q. The same day? A. Yes.

Q. Just the three of you present?

A. Yes.

Q. Will you tell us what that conversation was in substance?

A. Mr. Hatfield told me what he was discussing with Mr. Lotz, and I told Mr. Lotz that whatever arrangements he made with Mr. Hatfield were satisfactory to me.

Q. And Mr. Hatfield did review with you the subject of their discussion? A. Yes, sir.

Q. And what did he say those had been?

A. Mostly about the extension of time in his pay period, and [627] that he wanted to drop the retention from fifteen per cent to fourteen per cent.

(Testimony of Ray E. Titus.)

Q. Generally, the same subject that Mr. Lotz just described here? A. Yes, sir.

Q. Was there any conversation involving American Fidelity and Casualty Company?

A. No, sir.

Q. And did you make a statement to him, in substance, that he was in trouble and you were going to help him? A. No, sir.

Q. Did you make any statement in which the word "trouble" was used? A. No, sir.

Q. How long were you with Mr. Lotz and Mr. Hatfield?

A. Altogether it couldn't have been over an hour.

Q. And were there any statements made to Mr. Lotz at that time as to what kind of business that he was expected to produce under your new arrangement? A. No, sir, not by me.

Q. Was there any by Mr. Hatfield?

A. Not to my knowledge, one way or the other, when I was there.

Q. I beg your pardon.

A. Not to my knowledge when I was with Mr. Hatfield.

Q. And did you thereafter have a telephone conversation with [628] Mr. Hatfield while he was in Oakland, some time later—in fact, in November?

A. I had several conversations with Mr. Hatfield while he was in Oakland.

Q. And as a result, subsequent to one of those conversations, did you yourself come to Oakland?

(Testimony of Ray E. Titus.)

A. The first time I came to Oakland I did not talk with Mr. Hatfield directly. I talked with Mr. Czar who had talked to Mr. Hatfield.

Q. I see. You had talked to Mr. Czar, who had come out with Mr. Hatfield? A. Yes.

Q. And you then came to Oakland?

A. Yes.

Q. Did you meet Mr. Lotz and Mr. Smead in Oakland? A. Yes.

Q. Did you have meetings with them?

A. Yes.

Q. What date was it you arrived in Oakland?

A. December 5th.

Q. And where did you first see those two gentlemen?

A. I saw them on December 6th, at their office, in the morning.

Q. And at that time did you have a conversation?

A. Yes. We discussed the condition of the agency. [629]

Q. And did you talk with both of them together?

A. Yes, sir.

Q. And did they review with you the events of the preceding two or three months?

A. Yes, sir.

Q. And in the same way that Mr. Lotz and Mr. Smead have given their testimony to the Court?

A. That is correct.

Q. Did you then say anything about a statement from either of them? A. I did.

(Testimony of Ray E. Titus.)

Q. What did you say?

A. I asked them for a statement, if they would give me a statement of the facts, and I had already had a statement which had been given Mr. Hatfield by Mr. Smead, but it was unsigned.

Q. This was this ten-page, handwritten document we have referred to that is in evidence here?

A. Yes. And we had an appointment with Mr. Smead and Mr. Lotz and Mr. Mead to look at it in Mr. Mead's office that evening and go over the whole matter.

Q. Did you keep that appointment?

A. Yes, sir. Mr. Mead met us, the gentleman already mentioned as being there and Mr. Mead read the statement that had already been prepared, and they made a few changes in it and they both signed it. Mr. Mead notarized it. [630]

Q. Did Mr. Mead read the statement? You will have to answer out loud. A. He did.

Q. Was there discussion about it?

A. There was.

Q. And they both signed it at that same time?

A. Yes, sir.

Q. And the meeting then adjourned?

A. Yes, sir.

Q. Thereafter, did you see them again?

A. I saw Mr. Mead in Mr. Lotz' office.

Q. You mean Mr. Smead?

A. Yes, and Mr. Lotz. I saw Mr. Smead and Mr. Lotz in their offices the following morning, and Mr. Mead came in about eleven o'clock and talked

(Testimony of Ray E. Titus.)

with Mr. Lotz, and we discussed the condition of the agency generally, and Mr. Lotz was preparing me another additional statement which was submitted.

Q. He did not write one out at the same time Ralph wrote his? A. No, sir.

Q. And promised to supplement it later on, did he? A. That is correct.

Q. Then did he so prepare a supplement?

A. Yes, sir.

Q. Where were you when you received it from him?

A. He delivered that to me in Santa Monica Sunday afternoon [631] in Carl Oldberg's home—December 7th.

Q. You weren't present when he brought it down? A. No, sir.

Q. How long did you remain in Oakland?

A. I returned to Chicago December 9th from Santa Monica.

Q. And did you come back to Oakland after that?

A. I came back to Oakland on December 13.

Q. And is that the time when you had the meeting in my office that we have referred to?

A. After December 13th, that is right.

Q. Do you recall the date?

A. I think it was December 13th or 14th.

Q. And you heard Mr. Lotz refer to the matter and the others. Does that substantially confirm your recollection of the events? A. Yes.

(Testimony of Ray E. Titus.)

Q. Now, when you returned to Chicago did you get in touch with Mr. Hart about this situation?

A. Yes, I called Mr. Hart on December 10th in New York and we had a discussion.

Q. Did you make any notes of that telephone conversation before you had it?

A. Yes, sir, I did.

Q. Did you make any notes after your conference with Mr. Schimberg, your counsel?

A. I did. [632]

Q. Did you read the notes over the phone to Mr. Hart? A. I did.

Q. Do you have those notes? A. Yes.

Q. I wonder if you would just give us the conversation or your statement as you gave it to Mr. Hart on the telephone.

Mr. Bronson: Before he uses them, I would like to see them before they are read.

Mr. Garrison: Surely. This might be a good time to break, Your Honor.

The Court: Let me inquire, did you indicate to the Master Calendar Clerk or anyone how long a time you wished to proceed?

Mr. Bronson: I don't recall being asked, myself.

Mr. Garrison: We started this case with a jury and said it would take thirty days, but we have cut it down to two weeks.

The Court: That is sufficient for all purposes.

(Whereupon an adjournment was taken until

10:00 o'clock a.m., Tuesday, May 11, 1954.)

The Clerk: Mid-States Insurance Company and

Anglo California National Bank versus American Fidelity and Casualty Company, further trial.

RAY E. TITUS

a witness for the plaintiff herein, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Garrison: Q. Mr. Titus, last evening I asked you about the conversation you had with Mr. Hart when you called him from Chicago in his office in New York. You said you did have such a conversation, and that before you made the call you wrote out the things you intended to say to him? A. That is correct.

Q. Will you read to His Honor the things you said to him in that telephone conversation?

Before you answer that, this is December 12th, after you had been out to California.

A. The telephone conversation I had with Mr. Hart was on December 10th.

Q. December 10th? And you had been in California previous to that? [635]

A. That is right.

Q. And the statements Mr. Smead wrote, that had been completed and you had seen them and had talked to Mr. Smead and Mr. Lotz.

A. "I have just returned from Oakland and have gone into all the facts in connection with the deal with Lotz. At this point I am calling with re-

(Testimony of Ray E. Titus.)

spect to American Fidelity policies allegedly cancelled in November and the risks attempted to be replaced in Mid-States.

“While I was there I investigated the whole series of transactions between American Fidelity, American Plan and Lotz and what occurred with respect to Mid-States during that period.

“I have statements from Smead, Lotz, copies of agreements of October the 20th, 1951, letter to Smead, complete file of incoming and outgoing teletype messages, and notice of termination of Lotz’ agency appointment, which is prior to the cancellation notice sent out by Lotz.

“I have brought all this information back, and have spent the entire day with my lawyers, and they tell me the facts constitute fraud on Mid-States, and that American Fidelity and American Plan are liable to Mid-States, and they have also told me that American Fidelity is guilty of serious violation [636] of California insurance laws.

“I feel that before I tell my lawyers to bring all this out in the open I should give you a chance to straighten out this cancellation deal now, as it requires immediate action, as Lotz has not sent out Mid-States policies, and I am not going to let them go out without submitting the whole deal to the insurance department.”

After that portion of the message was given to him we had some miscellaneous discussions, which ended by him saying he would meet in my office on

(Testimony of Ray E. Titus.)

December 12th at 11 o'clock, and with that the conversation ended.

Q. And did you meet him on December 12th in your office?

A. Yes, sir, he came there with Mr. Feller. They came in about 3 o'clock because their plane had been delayed.

Q. Did you have further conversation at that time?

A. We discussed the entire matter. I told him about the things I had, although I did not show them to him. He did tell me that he had knowledge that I had this letter from Smead and his contract because he had talked with Mr. Smead in Oakland, and the meeting broke up about 5:15.

Q. Did you show him at that time any audit figures that you had made?

A. The audit figures I did not have at that time. We discussed the fact that I was having figures made up by Lester, [637] Herrick and Herrick. However, they had not come in.

After he left the office, they came in shortly after that; and he called me at home that night and we had further discussion, and I told him I had received the figures and made an appointment with him to meet me in the office next morning.

When he came in the next morning we had the figures there, I gave him a copy of them, and we discussed them in quite some detail. And he left the office with the statement that the American Fidelity directors were going to meet—I believe

(Testimony of Ray E. Titus.)

the date was December 14th—and he would lay the matter before them and let me know what their decision was with respect to the rewrites.

Q. Had you previously employed Lester, Herrick and Herrick to make an audit of the Lotz books?

A. Yes, sir, I made arrangements with them before I came out here on December 4th.

Q. And that was the same firm that was represented by Mr. Horton, the witness who testified here? A. Yes.

Q. Was that the extent of that conversation you had with Mr. Hart at about that time?

A. That's correct.

Q. Did you return to Oakland after that meeting?

A. Yes, sir, I came out here next day.

Q. And had further conferences with Mr. Lotz and Mr. Smead? [638]

A. That is correct.

Q. I believe you testified it was on this later trip that they came into my office and the statement was prepared there. A. That is correct.

Q. Did you receive some documents from Mr. Lotz in connection with a proposal that he had prepared to continue his operation?

A. Yes, sir. You mean after I came back?

Q. Yes. A. Yes, sir.

Q. And that was never accepted by you, I believe? A. No, sir.

Q. Then after that did you make arrangements

(Testimony of Ray E. Titus.)

or have arrangements made to take over the space that had been—some of the space Mr. Lotz had previously occupied and to rent some of his equipment? A. Yes, sir.

Q. And that arrangement is contained in Plaintiff's Exhibit 14, being a letter dated December 14th—December 18th, I guess it is.

A. December 28.

Q. December 28th? A. Yes, sir.

Q. I notice that attached to this exhibit is an inventory of office equipment. Is that the office equipment that you rented from him? [639]

A. That is correct.

Q. How much rent did you pay for the use of the equipment?

A. We paid him \$1,200 for a year.

Q. And after you had no further use for the equipment, what was done with it then?

A. It was returned to—. We offered it to Mr. Dusky or to Mr. Lotz, and I believe later he had some agreement with Mr. Dusky, and we eventually turned it over to Mr. Dusky under Mr. Lotz' approval.

Q. Mr. Dusky then being Mr. Lotz' attorney?

A. That is correct.

Q. I will show you a letter dated December 12, 1952, addressed to Mr. Lotz by Mid-States Insurance Company, and ask you if that is the document that contains the arrangement for turning over this equipment to Mr. Dusky?

A. It is.

(Testimony of Ray E. Titus.)

Mr. Garrison: I will ask that that be received in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon Letter dated December 12, 1952 addressed to Mr. Lotz by Mid-States Insurance Company was admitted into Evidence and marked Plaintiff's Exhibit No. 32.)

Mr. Garrison: If I may read this to Your Honor, it is [640] dated December 12, 1952:

"Mr. Joe Lotz, 5272 Lawton Avenue, Oakland, California.

"Dear Mr. Lotz:

"Attached hereto is a list of the furniture and chattels which were surrendered to Mr. Byron Dusky as your assignee. Would you please sign at the bottom indicating that your directions have been complied with and that said property was properly delivered."

It is signed by Mid-States Insurance Company, by Francis W. Keyes.

Then at the bottom it says:

"I hereby indicate my acceptance and approval releasing Mid-States Insurance Company from any liability in connection herewith", signed "Joseph P. Lotz"

Mr. Garrison: Q. At about the time you came back to Oakland after your meeting with Mr. Hart did you formally terminate Mr. Lotz' insurance agency with your company? A. Yes.

Q. I show you a letter dated December 18th——

Mr. Garrison: I think you have seen this?

(Testimony of Ray E. Titus.)

Mr. Bronson: I have seen it.

Mr. Garrison: Q. Addressed to Mr. Lotz by yourself, [641] registered mail, and ask you if that is the letter that was dispatched to him terminating his agency contract?

A. Yes, sir, that is a copy of it.

Q. Written by you? A. Yes, sir.

Mr. Garrison: I ask it be received in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon Letter dated December 18, 1952 addressed to Mr. Lotz from Mr. Titus was admitted into Evidence and marked Plaintiff's Exhibit No. 33.)

Mr. Garrison: I won't read it. It is just in the formal language.

Mr. Bronson: The effective date was what? January 21st, 1952, was it?

Mr. Garrison: January 21st, 1952.

Mr. Garrison: Q. What position did Mr. Donnelly have with your company?

A. He was an insurance adjuster and a field representative. He was terminated before I became president, but I am familiar with it.

Q. He left there in 1948?

A. The last of 1948 or early 1949.

Q. Was he ever an officer of the company? [642]

A. No, sir.

Q. How about Mr. Cass? How long since he has been employed by Mid-States?

A. He was—he left the company in October 1950.

(Testimony of Ray E. Titus.)

Q. Do you remember the extent of any writings in the Mid-States Insurance Company by Mr. Lotz in April and May of 1951?

A. His writings were almost non-existent. In fact, I believe in May we received minus writings because of cancellations.

Q. Cancelled out most of the business that he was writing? A. That is right.

Q. How about April?

A. April, there was very small writings. [643]

Q. And January? Let's see, in March, do you remember whether he had any?

A. They were very small writings that we had in the early part of 1951.

Q. Now, calling your attention to—well, first, was the account current with you at that time?

A. No, sir.

Q. Calling your attention to Defendant's Exhibit G, a letter from you to Mr. Hatfield dated June 6th, 1951—do you remember that letter?

A. Yes, sir.

Q. In that letter you say—

Mr. Bronson: May I see the letter, please?

Mr. Garrison: Sir?

Mr. Bronson: Are you going to refer to it?

Mr. Garrison: Yes.

Mr. Bronson: I would like to identify it, if I may. Thanks.

Mr. Garrison: Q. In this letter to Mr. Hatfield you say:

"I believe I already told you Kledzik should be

(Testimony of Ray E. Titus.)

responsible for lining up agents in the Los Angeles area, and I do not think you want to expand your activities with Joe Lotz.

“Again, I must say if we can’t get better representation in California than Joe Lotz, we will [644] never stay out of trouble.”

Would you tell the Court what the situation was you were talking about in that letter?

The Court: That was a June letter?

Mr. Garrison: Q. This is June of 1951?

A. Yes. That letter had to do with our appointments of representation in the Los Angeles area, and we already were represented there by a very high class agency and we had our own branch office there, and I did not feel that we should have any further representation there.

With respect to the reference to Mr. Lotz, we had had some trouble between the two agencies, Mr. Lotz giving certain agents a different deal than the other agency, and we were placed in the position of having two agents of the company giving different arrangements to their sub-agents. It was very embarrassing.

Q. In other words, it involved a problem in your agency plan? A. That is right.

Q. And at that time he hadn’t been writing any business, as you have just testified, and this letter had no reference to finances at all?

A. No, sir.

Q. I think yesterday, Mr. Titus, you made some

(Testimony of Ray E. Titus.)

reference to the amending of Mr. Lotz' contract in May. Do you remember your [645] testimony?

A. Yes, sir.

Q. What is the fact regarding the change that was made in Mr. Lotz' contract by your company in the month of May, 1951?

A. Mr. Lotz and Mr. Hatfield had had a conversation regarding reducing Mr. Lotz' retention in May, but that had never been formalized into a contract other than by letter, and it was later—it was done in September.

Q. It was accomplished later on?

A. Yes.

Q. I think you said in your testimony yesterday that it was accomplished in May. You are now correcting that, is that so?

A. That is correct.

Q. The change in the percentage in the retention, was that arrived at in May with Mr. Lotz?

A. Yes, sir, and formalized by a letter but not by contract, and it was in effect all that time.

Q. Yesterday I think your testimony was somewhat different with respect to the date of that change in retention.

A. No, it was in May.

Mr. Garrison: I see it was. That is all.

Cross Examination

Mr. Bronson: Q. You have given an explanation of the June 5th letter, 1951, where you said if you continued with [646] Joe you would always be

(Testimony of Ray E. Titus.)

in trouble—Joe Lotz, that is. I am showing you now a photostat of a letter, inter-company correspondence from Ray E. Titus to Dick Cass, and it is dated August 17, 1950.

Will you read that, and also read Mr. Cass' comment at the end.

A. "From what you tell me it seems to me Joe Lotz needs——"

Q. No, I just want you to identify it. Did you write that letter to Mr. Cass? A. Yes.

Q. Did Mr. Cass make the notation that appears in handwriting at the bottom? A. Yes, sir.

Q. And returned it to you?

A. Yes, sir.

Mr. Bronson: All right, that identifies it, I think. Would you mark that, please, prior to reading it?

(Whereupon letter dated 8/17/50, marked Defendant's Exhibit H for identification.)

Mr. Bronson: I will read this to Your Honor. It is dated August 17, 1950, from Ray E. Titus to Dick Cass. The typewritten part at the top is as follows:

"From what you tell me, it seems to me that Joe Lotz needs to be watched very carefully on a [647] day-to-day basis.

"Shouldn't you have a review made of his business coming in here by the Underwriting Department similar to what we made on Sandy Evans yes-

(Testimony of Ray E. Titus.)

terday to determine what day-by-day help he needs?"

Signed "Ray".

Mr. Bronson: Q. Apparently that refers to yourself? A. Yes, sir.

Mr. Bronson: Then under the signature "Dick" is the following handwritten portion at the bottom:

"Such is not the case. His loss ratio was excessive from his point of view—not ours. It was running about 55 per cent which did not leave him enough profit to expand the way I wanted him to. We are trying to get this ratio down ten or fifteen points so he will have more profit to reinvest in expansion so we make more money. Dick."

Q. Dick is the first name of Dick Cass, isn't it?

A. That is correct.

Q. And he was vice-president and field representative out here?

A. He was executive vice-president of the company at the time.

Q. Executive vice-president? Now, that was a year before this August meeting you had. [648]

A. That is correct.

Q. Did you set up a scheme with Mr. Cass to watch him day-by-day for that purpose?

A. What was mentioned in that memorandum was specifically mentioned—underwriting; and we did give him underwriting assistance, and it had to do with a previous memorandum which had been

(Testimony of Ray E. Titus.)

received from Mr. Lotz by us in which he raised a question about his loss ratio.

Q. Yes, but what I am getting at, we don't have it in the documents we asked you to produce, but it starts out and says, "From what you tell me." Now, there was some conversation between you and Mr. Cass, was there not?

A. That is correct.

Q. Which preceded that typewritten inter-office memorandum you sent him?

A. That is correct.

Q. And Mr. Cass presumably had that in mind when he put down his subscription at the end? That is, he had in mind the conversation that you had which you interpreted in your comments, true?

A. He had in mind the same thing I had in mind, which was the underwriting help which Mr. Lotz needed at the time so that he could write the proper kind of business to reduce his loss ratio——

Q. Yes, but—— [649]

A. ——which is all outlined in the letter.

Q. He indicates on here that his loss ratio was excessive from Lotz' point of view but not from the point of view of the company.

A. I think you will remember that the testimony in the file, or in the court, has mentioned that the loss ratio of the Lotz agency in 1950 was around 50 per cent, and naturally Mr. Lotz was interested in reducing that loss ratio so that he could make more money, and we were interested in that also.

Q. Yes, Well now, supposing in 1950 he was

(Testimony of Ray E. Titus.)

paying out 25 or 30 per cent to acquire business from sub-agents, was running a loss ratio of 55 per cent, and it cost him somewhere between 10 and 18 per cent to run his business, he was losing money the day Cass wrote this letter, wasn't he?

A. On your interpretation, but those were not the facts, sir, at that time.

Q. Well, you mean in respect to what he was paying to acquire the business?

A. No, with respect to how much money he was making as an agency.

Q. Well, he wasn't making out in Mid-States? He was losing money?

A. In 1950, sir, we paid him \$75,000 in commissions which he had made on business he wrote in Mid-States.

Q. Now, with reference to your statement about how much [650] business you were doing, that is, Mid-States was doing——

Mr. Bronson: If I may step up here, Your Honor, it will simplify it.

Q. I am referring to the Lester, Herrick and Herrick report. You have reviewed this page 13——

A. Yes.

Q. ——where it shows the business written month by month beginning in December, 1950, and going down to August? A. Yes.

Q. You are familiar with that?

A. Yes, sir.

Q. And you are familiar with the fact that he wrote in Mid-States sixteen thousand in January;

(Testimony of Ray E. Titus.)

thirteen, or practically fourteen thousand in February; and in March just a few dollars under sixteen thousand? A. Yes.

Q. Is that, in March, the business you say was practically nothing?

A. No. You will notice in December here he was writing \$33,000, and his account had been running twenty five or thirty thousand dollars a month in the writings that he had had prior to the time that he was contacted by American Fidelity, and then the writings dropped down to fifteen, thirteen, fourteen, and in the following month \$433, and the following month after that \$2,719. [651]

Q. Yes——

Mr. Bronson: Pardon me?

Mr. Garrison: He read \$2,719. That's a minus figure.

Mr. Bronson: That's a minus figure.

Q. In June he wrote \$32,000? A. Yes.

Q. A minus figure?

A. Sir, that was after the——

Q. The May meeting?

A. No, after the letter which I was talking about, which was on June 5th.

Q. Were you here in court—I may be misquoting Mr. Hatfield, but didn't he say the business for 1950 averaged around fourteen thousand a month?

A. It was my memory of the business that it was running around twenty to twenty five thousand dollars a month.

Q. There is no question about it, is there, Mr.

(Testimony of Ray E. Titus.)

Titus, that when you had your meeting in August 1951, you were very anxious to have Joe Lotz write a large volume of business for you?

A. Depending on what you mean by large. Why, twenty five——

Q. (Interposing) You wanted him to increase his business?

Mr. Garrison: Let him finish his answer.

Mr. Bronson: I beg your pardon.

A. I think we were anxious in having Mr. Lotz write us \$25,000 premium volume. [652]

Mr. Bronson: You indicated this morning in connection with some testimony you gave yesterday that the concession that was given Joe Lotz as to the company retention, reducing it from fifteen to fourteen per cent was made in May, 1951?

A. That is correct.

Q. Was that in a meeting with Mr. Lotz?

A. I was not present there.

Q. Where was it?

A. It must have been a conversation that Mr. Hatfield and Mr. Lotz had. There was no meeting at that time.

Q. You knew about it, did you not?

A. Yes, sir.

Q. Was the conversation between Mr. Hatfield and Mr. Lotz in Chicago or in Oakland?

A. Mr. Hatfield brought the matter to my attention.

Q. Well, where was the meeting that they had where they discussed it with Lotz?

(Testimony of Ray E. Titus.)

A. I imagine it was by phone.

Q. But you didn't formalize that until the agreement of September 1st?

A. That is correct.

Q. But the company started thereafter immediately in May, didn't it, to reduce its retention to fourteen per cent?

A. That is correct.

Q. Was that for the purpose of reducing the business that [653] Joe was writing for you?

A. No. We were anxious to get the business because it had been taken away from us by American Fidelity and we were anxious to get it back.

Q. It wasn't because Joe was running behind?

A. No, sir.

Q. It wasn't to meet competition?

A. I don't know of any other reason we would reduce a retention which we had maintained for pretty near three years.

Q. Did you ask for a statement from his books from Mr. Lotz at that time?

A. No, sir.

Q. Did you ever?

A. No, sir.

Q. During all the time that he was writing for Mid-States, going back to 1947, you never asked him for a statement?

A. No, sir.

Q. You didn't ask, for instance, for a statement—I mean by that a statement of his assets, liabilities and earnings?

A. That is what I assume you mean.

Q. Did not ask for one at or about the time you wrote this letter of August 17th, 1951?

A. No, sir. I was not concerned about his finan-

(Testimony of Ray E. Titus.)

cial ability at that time because he had been a good agent for us and was a good agent for us in 1950.

Q. You mean in the sense that he was getting business?

A. And making money for him and us both.

Q. And the way he kept his accounts?

A. Sir?

Q. In connection with the way he paid off.

A. Yes, sir.

Q. On his obligations? A. Yes, sir.

Q. Coming down to this trip you took out here in December of 1951, you say you got here, if my notes are correct, on December 5th but you didn't see Mr. Lotz until the next day?

A. That's correct.

Q. You saw Mr. Smead, did you?

A. Not that first day, no, sir.

Q. All right, you saw Mr. Lotz and talked about the agency. A. Not the first day.

Q. When did you talk about it?

A. The following day, December 6th.

Q. Did you see on December 6th a statement that Mr. Smead had written, the ten-page, handwritten statement? A. Yes, sir.

Q. And at the time you first saw it you noted Mr. Lotz hadn't signed it, did you not?

A. Yes, sir, and neither had Mr. Smead.

Q. Did you call up Mr. Lotz on the telephone either that day [655] or at or about that time and ask him, "Are you going to cooperate? Are you going to sign this statement?"

(Testimony of Ray E. Titus.)

A. I believe there was such a conversation. I don't remember whether it was on the phone.

Q. At the time he signed it, isn't it a fact that you told him if he would sign it you would keep him in business and not close the agency?

A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Did you ever have a conversation of that kind in the presence of Mr. Smead?

A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Well, what is the situation then? That the agreement wasn't signed, you telephoned and asked, "Are you going to cooperate? Are you going to sign that?"

Didn't you do anything or say anything to grease the wheels, or make any promises in that connection?

A. No, sir. I was trying to find out what the facts were.

Q. I understand that. But he hadn't signed the statement that you wanted signed—wanted signed bad enough to phone him and ask him if he was going to cooperate with you. Apart from your interest in the facts, you wanted his signature on it, [656] didn't you?

A. I wanted to get the facts.

Q. Did you want his signature on that—oh, excuse me.

Mr. Garrison: Just give him a chance to answer.

(Testimony of Ray E. Titus.)

A. This gentleman owed us three hundred thousand—

Mr. Bronson: Once in a while your foot gets over the line without your intending it.

Mr. Bronson: Q. Go ahead and start the answer over again.

A. This gentleman owed us some \$450,000.00, and naturally we were both interested in trying to come to some understanding about what was going to be done about it.

Q. Both who? A. Mr. Lotz and myself.

Mr. Bronson: I will ask that what Mr. Lotz wanted go out as a conclusion of the witness, unless Mr. Lotz said something.

A. Will you restate your question?

Mr. Bronson: I am addressing an objection to the Court.

The Court: It may go out.

Mr. Bronson: Q. Go ahead.

A. We had, on the second occasion I was here, December 6th, we had many conversations about the condition of the agency, and Mr. Lotz called his attorney, Mr. Mead, and we agreed to meet in Mr. Mead's office that evening, which we did, and [657] Mr. Mead read this statement which had been prepared by Mr. Smead, and comments were made about it, changes were made in it, Mr. Mead notarized it. There was no pressure of any kind on my part to get anything else other than the facts into the statement.

Q. Specifically, and before you got the signature

(Testimony of Ray E. Titus.)

of Mr. Lotz on that agreement, and at or about the time that you were asking him was he going to co-operate, did you get any statement from him at all about what your plans were with regard to the further operation of the Lotz agency?

A. I had no plans about the agency.

Q. Did you make any statement to him on the subject? A. No, sir.

Mr. Bronson: That is all.

Cross Examination

Mr. Kakures: Q. Mr. Titus, do you remember the date of your arrival in Oakland in December?

A. Yes, sir.

Q. Approximately what date was that?

A. December 5.

Q. And did you upon arrival meet with Mr. Hatfield?

A. That's correct, at the Leamington Hotel.

Q. At that time what did Mr. Hatfield tell you?

A. He reviewed the account and what he had found out while he was out here, and told me of meetings he was having with—— [658]

Q. (Interposing) And your trip here, Mr. Titus, was in response to that telephone call you had from Mr. Hatfield?

A. He called, Mr. Hatfield called Mr. Czar and Mr. Czar called me.

Q. You didn't talk to Mr. Hatfield on the telephone? A. No, sir.

(Testimony of Ray E. Titus.)

Q. After your meeting there at the hotel, what happened after that? A. The first day?

Q. Yes, sir.

A. I had other business to do. I was trying to find a lawyer, and I made a phone call—Do you want to know everything I done that day?

Q. No, I just wanted to know what you did right after that in relation to the Lotz agency matter, such as contacting Joe Lotz or Mr. Smead or any of the personnel there.

A. I contacted neither Mr. Lotz or Mr. Smead that day.

Q. When did you first see Mr. Lotz or Mr. Smead?

A. The following day, in the morning, December 6th.

Q. And was that in their office? A. Yes.

Q. And what did you tell Mr. Lotz?

A. We discussed the condition that his agency was in. We discussed the fact that he had told Mr. Hatfield, and this plan that apparently had been conceived; and I wanted to get [659] the facts on it and, as I previously testified, we arranged a meeting in Mr. Mead's office.

Q. At that time did you tell Mr. Lotz that, words to this effect, Mr. Titus, that, "things look a little tough, Joe, but if you cooperate with us we will help you along?" so far as you recall, Mr. Titus?

A. I don't remember any statement with the word "cooperate" in it, although I attach no significance to it. I might have said it.

(Testimony of Ray E. Titus.)

Q. Did you add any words of encouragement, that you would see to it, that you would help Joe out of this so-called mess he was in?

A. Well, we were anxious to work a plan out. I am not familiar—I do not remember any specific comment in that respect.

Q. In other words, it was your interest, of course, as President of Mid-States, to first of all get this thing worked out and get it shipshape, is that correct?

A. That is correct.

Q. Then did you at that time ask Mr. Lotz or Mr. Smead for these statements, Mr. Titus?

A. Yes, sir.

Q. What was Mr. Lotz' response to that?

A. Mr. Lotz was, as he testified, very confused and he was—he said he would give us a statement, but he did not at that [660] time.

Q. Was Mr. Hatfield with you at that time?

A. Yes, sir.

Q. And then Mr. Smead, I presume under your testimony, and Mr. Hatfield started writing his statement, is that correct?

A. Mr. Smead had written his statement the night before.

Q. The night before? And then did you take a statement back from Mr. Smead?

A. No, Mr. Hatfield gave me the statement in the morning—the following morning.

Q. Then what did you do with that statement?

A. I left it at the safe at the Leamington Hotel.

Q. And that evening you took it up to Mr.

(Testimony of Ray E. Titus.)

Mead's office, is that correct? A. Yes, sir.

Q. And Mr. Mead, at that time, was he representing— A. Mr. Lotz.

Q. Mr. Lotz? And was Mr. Mead at all surprised about the fact that statements had already been given, Mr. Titus?

A. He didn't seem to be.

Q. Did he refuse to read the statements?

A. No, he read them.

Q. Did he read them out loud? A. Yes, sir.

Q. And you said he showed no—He didn't rebuke you or [661] Mr. Hatfield for having taken the statements outside of his presence?

A. No, sir.

Q. When was it that you and Mr. Hatfield and Mr. Smead, I believe, and Mr. Lotz went to Mr. Garrison's office?

A. That was after I returned out here after December 13th. I believe it was the 14th or 15th, somewhere in there.

Q. And at that time—Excuse me.

A. In any event, it was between December 13th and December 20th when I returned to Chicago.

Q. At that time did you see Mr. Lotz in Mr. Garrison's office? A. Yes.

Q. Did you talk to Mr. Lotz?

A. Yes, sir.

Q. What did you tell him at that time?

A. We just discussed the events that had happened.

Q. Did you tell him, "Joe, I will do everything

(Testimony of Ray E. Titus.)

I can for you under the circumstances if you will go along with us, I will help you out," words to that effect?

A. I don't remember any statement like that.

Q. Did you tell him you would keep him in business if you possibly could? A. No, sir.

Q. Did you tell him you wouldn't revoke the agency at that [662] time?

A. No, sir. It wasn't discussed.

Q. Coming back to the assignments, Mr. Titus, you were not here when the assignments were taken from Mr. Lotz, were you? A. No, sir.

Q. Who represented Mid-States in that?

A. Mr. Czar and Mr. Hatfield.

Q. And were those requested on your part?

A. No, sir.

Q. Who requested those assignments?

A. That was Mr. Hatfield and Mr. Czar.

Q. Following this meeting in Mr. Garrison's office, when was the arrangement introduced for the taking over of the Joe Lotz agency, that is, so far as the equipment and supplies, and so forth?

A. I believe that was December 28th. That was after I had returned to Chicago.

Q. In other words, after Mr. Garrison's office meeting there you left for Chicago, is that correct?

A. On December 20th.

Q. And who maintained the office here for Mid-States at that time?

A. Mr. Hatfield was here and Mr. Keyes.

Q. How long did that operation continue?

(Testimony of Ray E. Titus.)

A. Until 1952 when we turned back the furniture and [663] equipment, and so forth, to Mr. Dusky which I have just testified to.

Q. Now, when did the Mid-States Insurance Company enter the insurance business in California?

A. I believe it was in—I am not sure of the date.

Q. And you withdrew from the insurance picture in California shortly after you closed up the Lotz agency?

A. We stopped writing business in California. We are still qualified in California.

Q. But you are not writing any insurance business?

A. That is correct.

Mr. Kakures: That is all.

Mr. Garrison: I have no further questions.

Mr. Bronson: Let me develop one thing.

Recross Examination

Mr. Bronson: Q. Did I understand that you were in Mr. Garrison's office on December 18th at the time that typewritten statement was taken?

A. Yes.

Q. And you terminated the agency five days later by a formal letter? That was the 23rd, was it?

A. I thought it was the 28th. It might have been the 23rd.

Q. Well, whenever it was, you knew when you sat there in Mr. Garrison's office you were going to terminate the agency? [664]

A. I did not, sir. The minute I made up my

(Testimony of Ray E. Titus.)

mind to terminate it, it was terminated, whatever the date is on the memorandum.

Q. Had you looked at the assignments, written assignments that were taken from Joe Lotz, dated around November 27th?

A. Did I look at them?

Q. Yes. A. Yes, sir.

Q. Well, they supply a provision there that the assignment can be terminated summarily without notice, do they not?

A. I am not—Are you talking about the——

Q. What is the agreement?

A. Talking about the statement Lotz made?

Q. What I am referring to was a letter. I can't readily find it here among this mass of exhibits, but it was dated that day, November 27th.

A. In which we gave him a 30-day cancellation notice?

Q. No, it is a letter written by Mr. Lotz, starts out, "Of my own free will and accord". Do you recall that letter? A. Yes.

Q. Do you recall, there is a provision in there where he accords you, or at least he accords whoever prepared the letter, a summary cancellation without notice?

Mr. Bronson: Have you the exhibit number of that, Mr. Garrison? [665]

Mr. Garrison: Yes.

The Witness: That is it you have your hand on.

Mr. Garrison: That is the letter that was prepared by Mr. Czar, the attorney out here from Chicago. It is one of these three (indicating).

(Testimony of Ray E. Titus.)

Mr. McKinnon: I think it is Plaintiff's Exhibit 6.

Mr. Bronson: Yes, that is it. I have it here.

Mr. Bronson: Q. Plaintiff's Exhibit 6, Mr. Titus, and on the second page, next to the last paragraph.

A. I remember the agreement, although we never accepted this agreement. That was the one that was——

Mr. Bronson: I will read a portion of it. It is the letter, if the Court please, signed by Joseph Peter Lotz and witnessed by Mr. Mead and Mr. Smead, dated November 27, 1951. The paragraph next but the last on the second page:

"I realize that I have violated my agency agreement with you, and agree that you are not waiving and have not waived any rights accruing to you from such violation, and I further agree that you have the right to cancel my agency agreement, dated September 1, 1951, at any time without notice and with or without cause, and I hereby hold you blameless and harmless for any loss that I might sustain due to such cancellation by you."

Mr. Bronson: Q. When you acted on November 28 to cancel [666] Joe Lotz' agreement, you made it effective as of January 21, 1952, am I correct in that? A. Yes, sir.

Q. But when you were over there in Mr. Garrison's office on the 18th of December, at the time the long, typewritten statement was taken, signed by both Lotz and Smead, you had already—Pardon me.

That followed the conversation on the telephone

(Testimony of Ray E. Titus.)

by some days with Mr. Hart that you mentioned?

A. That is correct.

Q. You had already made up your mind that there was a cancellation coming up as soon as you got around to writing it, hadn't you?

A. Are you telling me what I made up my mind to?

Q. I am asking you if that isn't true?

A. No, sir.

Q. You made it up, did you, the day you wrote the letter, December 28th?

A. That is correct. Do you wish me to explain why?

Q. No, I don't. If your counsel wants you to give any explanation, he will bring it out, I am sure.

A. I am sorry.

Mr. Bronson: That is all.

Mr. Garrison: Do you wish to make any comment regarding your answer, Mr. Titus? If you don't, it isn't necessary. [667] I have no further questions.

(Witness excused.)

Mr. Garrison: That is the Plaintiff's case, Your Honor.

Mr. Bronson: Now, has the Anglo Bank any case to put in?

Mr. McCallum: No further case.

Mr. Bronson: How about you (addressing Mr. Kakures)? Anything further?

(No audible response.)

Mr. Bronson: Very well. First, if the Court please, I would like to reserve at this time, to be

presented later, a motion to dismiss on the Plaintiff's evidence.

Our first testimony is the deposition of Richard M. Cass, taken on behalf of American Fidelity and Casualty Company and American Plan Corporation in Chicago, Illinois, on April 20, 1954. With the Court's permission and counsel's, I will read that.

The address at which it was taken is not important. That was present Mr. Lewis Schimberg, who is in Court, and Messrs—I believe you gentlemen weren't personally represented at the time?

Mr. Garrison: No.

Mr. Bronson: Mr. Max Weingarten of my office, who appeared for the two corporations. Certain stipulations were entered into which I shall not read, and the witness was sworn.

(Whereupon the deposition of Richard M.

Cass was read to the Court by Mr. Bronson.)

Mr. Bronson: That concludes the deposition. I will call Mr. Mark Hart, please.

MARK HART

a witness called on behalf of the defendant, being sworn to tell the truth, the whole truth and nothing but the truth testified as follows:

The Clerk: Q. State your full name and occupation to the Court.

A. Mark M. Hart. I am president of the American Plan Corporation.

Direct Examination

Mr. Bronson: Q. How long have you held that position, Mr. Hart? A. For seven years.

Q. For seven years? A. Yes, sir.

(Testimony of Mark Hart.)

Q. And how long have you been in the insurance business generally? A. For thirty years.

Q. Prior to your association with the present employer, the American Plan Corporation, what was your connection, briefly, with the insurance business from the beginning?

A. For the previous five and one-half years I was executive vice-president of the Resolute Insurance Company in Hartford, Connecticut. And for some eight years prior to [669] that I was agency acting supervisor of the Globe & Rutgers Fire Insurance Company. Prior to that I was assistant chief accountant of the Importers and Exporters Insurance Company.

Q. You assumed this position you presently hold about seven years ago, you say?

A. Yes.

Q. Would you briefly state—and I mean briefly—the relationship between the two defendants, American Plan Corporation and American Fidelity and Casualty Corporation?

A. The American Plan Corporation holds a management agreement with the American Fidelity and Casualty Company as one of its companies, the gist of which is that we are constituted as United States Automobile Physical Damage managers. We perform various work for that insurance company.

Q. Except to underwrite? I mean, they write the insurance and issue the policy, is that right?

A. Well, that is right, but an insurance company generally doesn't write the policies, either. We, that is to say, perform every function that would ordi-

(Testimony of Mark Hart.)

narily be accomplished by an insurance company, and we submit only monthly summary figures to our principal, the American Fidelity and Casualty Company.

Q. The fund, though, and the actual underwriter of the insured company, is American Fidelity and Casualty, is [670] that true? A. Yes, sir.

Q. Is that relationship unknown in the insurance business except in your case?

A. No, sir, it is common in the open marine field, and the inland marine field, or I should say in any specialized field of insurance.

Q. American Fidelity and Casualty does write other types of insurance besides automobile physical damage?

A. Yes. Primarily they are transportation specialists for public liability and property damage.

Q. Your first acquaintance with Joe Lotz—personally, I am speaking of now—was when?

A. In May, 1951.

Q. Is that the first time you ever met him personally? A. Yes, sir.

Q. Did you have knowledge of the account of Joe Lotz before that time? A. Yes.

Q. When you saw him in May, 1951, where was that? Here or elsewhere?

A. It was in San Francisco. He came across the Bay to meet me. I was here on other business.

Q. Did you have difficulty with him at that time about his job? [671] A. In general, yes.

Q. Did you know in general the length of time with which your company had had relations with

(Testimony of Mark Hart.)

him and the extent of it at the time you saw him in May? A. Yes, I did.

Q. When was the next time you saw him, Mr. Hart?

A. The next time I saw him was August 20th. I beg your pardon, the next time I saw him here was August 20th. I saw him in New York on August 13th.

Q. During the time you saw him or had this conversation with him here in May of 1951, was there any discussion with Mr. Lotz about the method under which he was doing business?

A. Yes.

Q. If so, will you state generally what the discussion was?

A. Yes. That was the first time that I personally had any exact knowledge of just how he was conducting the business.

Q. What was the conversation, generally, as best you can, on any subject of the conduct of the agency?

A. Well, several subjects were discussed. I learned from Mr. Lotz that he was what we call buying his business——

Mr. Garrison: I move to strike the answer on the ground that it is a conclusion from the conversation and not [672] what was said.

The Court: State as near as you can what was said between you and Mr. Lotz.

A. Yes, sir. Mr. Lotz told me that he was procuring his business from sub-agents by paying a

(Testimony of Mark Hart.)

commission for it. Mr. Lotz also told me that he had been functioning under this so-called float basis, which was a new term to me. I cautioned him against it.

Mr. Bronson: Q. Did he make plain to you what he meant by float business?

A. Upon questioning, he did.

Q. What did he say?

A. He told me that he would pay the premiums of this particular month, for example, with the company with premium collections applicable to a succeeding month. Of course, that was a diversion known under the term "kiting".

Mr. Garrison: I move to strike that on the ground it is not part of the conversation and not responsive to any question. It is purely a voluntary statement.

Mr. Bronson: It may go out.

Mr. Bronson: Q. Just leave out the conclusion and state the conversation, as the Judge asked you to do. A. Yes, sir.

Q. Did you make any comment in response to that disclosure [673] by Mr. Lotz?

A. Yes, I told him it was unscientific and unsound.

Q. Did any other officer, to your knowledge, see Mr. Lotz during the interval between that meeting and the meeting of August 13th?

A. Yes, Mr. Sudekum, our executive vice-president, called on him in July. I am not sure of the exact date.

(Testimony of Mark Hart.)

Q. Did you make, or was under your instructions any request made in this interval of time for a statement of Joe Lotz' condition?

A. Yes, there was.

Q. His financial condition? A. Yes.

Q. State the circumstances. State what was done.

A. We have a general rule in our office——

Mr. Garrison: (Interposing) I move to strike that——

Mr. Bronson: Q. Just state what was done.

Mr. Garrison: It isn't responsive to any question.

Mr. Bronson: Q. We will get along better if you will just answer the questions, Mr. Hart.

A. Yes.

Q. I know you want to explain matters and give the broad answer, but leave it out.

A. Would you be good enough to repeat your statement?

Q. I wanted to know about any other officer—No, I asked [674] whether there had been any request made for a financial statement?

A. Yes.

Q. When was this?

A. We started in April to request financial statements from Mr. Lotz.

Q. Did you get a statement in April?

A. No, sir.

Q. May? A. No, sir.

Q. Did you get any statement in June or July?

A. No.

(Testimony of Mark Hart.)

Q. Do you know how many requests were made?

A. I can't actually say because they were under our treasury department supervision.

Q. With reference to this meeting in August, the 13th of August, where did that take place?

A. That took place in my office in New York.

Q. Who was present?

A. Mr. Lotz, Mr. Smead, Mr. Sudekum, Mr. Will, Mr. Feller and myself.

Q. Mr. Feller is an attorney from the office that represents you in New York, is that right?

A. That is right.

Q. What is the name of the firm? [675]

A. Boyle, Feller and Reeves.

Q. Will you state the circumstances under which that meeting was held, just briefly?

A. We had been asking Mr. Lotz to remit to us some \$6600 for commissions on a Public Service reinsurance transaction, and when he failed to pay us this money I became concerned because he owed us a large May balance that was to become due on August 15th. I became concerned over the fact that he couldn't pay us a relatively small amount, so I asked him to come to New York.

Q. When you talk about the May balance, what was the credit period or settlement period under your arrangement with Mr. Lotz? What period of time was he given to settle his business in any given month?

A. Our contract called for a 75 day settlement.

Q. So that his May business he should be satis-

(Testimony of Mark Hart.)

Q. fying by the 15th day of August, 75 days after the close of the month of May, is that correct?

A. Yes.

Q. And you say you got concerned because there was an item of \$6600 of reinsurance transactions that he didn't pay?

A. That is right.

Q. And the May balance was how much?

A. Approximately \$66,000. [676]

Q. And that was due on the 15th, two days after he arrived in New York?

A. Yes.

Q. Did you have a discussion there with him on the subject of his finances?

A. Oh, yes.

Q. Were there any representations made to you at that time by either Mr. Lotz or Mr. Smead or both of them as to their financial condition?

A. Yes.

Q. Let me ask you this: Some reference was made earlier to a check of some \$50,301 that wasn't paid for some reason at the bank that was later cleared, do you recall that?

A. Yes, sir.

Q. Was that any concern of yours at that time?

A. No, that matter had been settled.

Q. So it was the fact that there was a \$6600 balance, with a \$66,000 balance shortly to become due, that gave you your concern?

A. That is correct.

Q. Well, now, going down to the discussion there in the office, in your office with you gentlemen present together, what statements were made to you by either Mr. Lotz or Mr. Smead as to their financial condition and obligations and as to their re-

(Testimony of Mark Hart.)

ceivables? Just give us it briefly as well [677] as you remember.

A. Firstly, they told us that they were in process of negotiating a hundred thousand dollar loan at the bank, some bank. They didn't name which one.

Secondly, upon questioning, they told us that a large part of the balance due us, and specifically \$140,000, was uncollected from sub-agents at that moment.

They then said that they had been discussing a 15 per cent prepaid contract with Mid-States, and they were going to check to see their Mr. Titus or Mr. Hatfield, I am not sure which, to try to consummate that arrangement.

Q. Did they make any statement to you as to what receivables they had?

A. Yes, they said it was \$140,000.

Q. And did they make any statement to you about what items they owed out of their business? Any statement on that subject?

A. I cannot exactly recall, Mr. Bronson. We did discuss that fact that at that moment, with their estimate for August, they owed us approximately \$240,000.

Q. That was the amount owing to you?

A. Yes.

Q. Did you at that time come to any conclusion with respect to the financial status of the Lotz agency and their ability to pay out their balances owing to you in [678] the amount of approximately \$240,000.

(Testimony of Mark Hart.)

A. Yes, sir. I felt that while their cash possibly might be strained at the moment, as the result of their large receivables, that there was no great concern because with the loan, with the receivables, with the equity they had in unearned premiums, well, they had ample to liquidate our balance.

Q. When you say their equity in unearned premiums, will you state what that means?

A. Well, under our contract they were guaranteed a minimum commission of 20 per cent of earned premiums, loss ratio notwithstanding, and at that time they had approximately \$300,000 in unearned premium reserve, so disregarding further cancellations, they had equity in their unearned premium reserve of approximately \$60,000.

Q. And when you talk about approximately \$240,000 owing to your company, do you have approximately the amount and the month in which the indebtedness was incurred that made up that sum of \$240,000?

A. Yes.

Q. Will you state that, please?

A. They were indebted to us for \$66,000 for May balances; \$50,000 for June; July was approximately \$80,000; and their estimate of August, of which we had no knowledge, was \$40,000. [679]

Q. And that totals roughly the sum you mentioned?

A. Yes.

Q. When you say they estimated \$40,000 for August, that was made in the middle of the month ostensibly on the basis of continuing the same

(Testimony of Mark Hart.)

amount of underwriting for the remainder of the month?

A. Yes. July was \$80,000 and they felt that was 50 percent of the business.

Q. A point was made a minute ago, in discussing their condition at that time they informed you they were in the process of making or about to make a prepaid commission arrangement with Mid-States Insurance Company. A. That is correct.

Q. Was any discussion had between them and you on the subject of the American Fidelity and Casualty making a similar arrangement with them—with Lotz? A. Yes, there was.

Q. What was that discussion?

A. Mr. Lotz stated that his operating experience with us was more satisfactory to him, he would like to continue with us, and asked if we wouldn't extend him a 15 percent prepaid commission.

Q. What did you tell him?

A. I told him it was not within our power to do so since our managerial contract does not permit us to pay prepaid [680] commissions.

Q. Was there any discussion whatever in that meeting with respect to the cancellation of the Lotz Agency by American Plan? A. No.

Q. Was there any decision in your mind at the time to take such action? A. No.

Q. There has been some reference made to some bits of conversation that are claimed to have taken place at that meeting. One of them had to do with

(Testimony of Mark Hart.)

what I will designate a so-called station to station call incident.

Do you recall a telephone call Mr. Lotz made from your office to Chicago?

A. Yes, I do.

Q. To Mid-States Insurance Company during that August 13th meeting? A. Yes, sir.

Q. State what happened?

A. Mr. Lotz said that when he got back to his hotel he said he was going to call Mid-States, and I don't recall whether he said he was going to set up a station to station call with Mr. Titus or Mr. Hatfield, and I said, "You can use the phone here, Joe."

Q. Who ordered the phone call put in? [681]

A. I did. I used my extension and called my operator to get Mid-States Insurance Company.

Q. Was there any statement by you at that time, or preceding that or afterward or at any time in that meeting about putting in a station to station call so that the people on the other end wouldn't know where the call originated? A. No, sir.

Q. As a matter of fact, do you know—were you present in Court when—strike that.

Do you know that Joe Lotz informed the Mid-States when he was talking with Mr. Hatfield there and Mr. Titus the day following that he had just called from your office? Do you know anything about that?

Mr. Garrison: That is objected to on the ground

(Testimony of Mark Hart.)

that it calls for hearsay as far as Mr. Hart is concerned.

Mr. Bronson: I am afraid it did.

Mr. Garrison: He wasn't present in Chicago.

Mr. Bronson: The question is withdrawn.

Mr. Bronson: Q. Another subject that has been brought up here was in reference to a Mr. Cass. He is the same gentleman whose deposition I read this morning, is that true? A. Yes, sir.

Q. Will you state whether there was any conversation during the time Mr. Smead and Mr. Lotz were there about going to see [682] Mr. Cass?

A. I cannot recall ever hearing any such conversation.

Q. Was there any reason known to you, any fact known to you that would suggest that you tell either Mr. Lotz or Mr. Smead not to see Mr. Cass when they went to Chicago?

A. No, sir. On the contrary. Mr. Cass wasn't friendly with Mid-States.

Mr. Garrison: I move to strike that on the ground that is another example of a voluntary statement, not responsive to the question about the conversation.

The Court: It may go out.

Mr. Bronson: Q. You are familiar with the statement made by Mr. Smead in writing, which is in evidence here, that purports to have been taken in Oakland about December 6th? A. Yes.

The Court: It is twelve o'clock. We will take a recess until two o'clock.

(Whereupon an adjournment was taken in this cause until two o'clock this same day.)

MARK HART

a witness called on behalf of the defendant, having been previously duly sworn, testified further as follows:

The Court: Proceed.

Direct Examination—(Continued)

Mr. Bronson: Q. Before taking up the statements, some of them, in the so-called December 6th meeting statement, there are one or two matters which I overlooked, to which I will direct your attention. Sometime in his testimony Mr. Smead stated that there was a dinner meeting in New York following the meeting in your office, when Mr. Lotz, Mr. Smead, and some of you, including you, were present. Was there such a dinner meeting?

A. Yes, there was.

Q. He stated—I am not giving his language exactly—"It all depends on Mid-States continuing to do business with Lotz." Do you recall any such statement as that?

A. No, sir, I do not.

Q. Do you have any recollection of the dinner meeting partaking of any business discussion at all?

A. No, to my best recollection it was purely a social meeting.

Q. He states in that same statement that Mr. Sudekum made [684] a statement, "What happens if Mid-States discovers our position?" Or similar

(Testimony of Mark Hart.)

language. You were alleged to reply, "I will worry about that when the time comes." Was there any such statement that you heard from Mr. Sudekum that you recall?

A. No, sir, that statement nor reply was never made.

Q. Did you make any statement that you would worry about that when the time comes?

A. No, I did not.

Q. He stated, whether it was in connection with that meeting or a later meeting—I am referring to Mr. Smead—the idea was to apply Mid-States premiums to pay off American Fidelity and Casualty. Was any such idea expressed by anybody at the meeting in New York?

A. None whatsoever.

Q. At the meeting in Oakland? A. No.

Q. Mr. Smead's statement of December 6th contains a number of matters that I have already reached, and I will go to those that I have not spoken of, leaving out, your Honor, a great many as to which there is no quarrel with whatever. I will endeavor to reach all of the matters that are otherwise. Mr. Smead's statement of December 6th states that you asked them the amount of their receivables and they answered \$75,000. Did you ask them the amount of their receivables?

A. Yes, sir, I did. [685]

Q. What was the response given by Mr. Smead or Mr. Lotz?

A. They estimated that it was around \$140,000.

(Testimony of Mark Hart.)

Q. Did that represent Mid-States premiums due?

A. Oh, no, it was American Fidelity and Casualty.

Q. The American Fidelity and Casualty?

A. Yes, sir.

Q. Nothing else?

A. To the best of my knowledge there was nothing else.

Q. Was the figure of \$75,000 in that connection mentioned by you at all or by Mr. Smead or by Mr. Lotz?

A. No, sir.

Q. Mr. Smead's statements to the effect that the American Plan through you instigated Lotz going to Mid-States to get a volume of business from them so that out of the collections of premiums made for them you could be paid off the amount of indebtedness due to the American Plan. Was that idea expressed by anyone at the meeting in New York?

A. No, sir, it was not.

Q. Or at the meeting in Oakland?

A. No, sir.

Q. Was the meeting in Oakland on August 22nd, 1951, that is, the 20th to 22nd, the last time that you were in Oakland during that year?

A. Yes, sir. [686]

Q. That was the last time you were in Oakland?

A. During that year.

Q. You stated this morning that Mr. Lotz or Mr. Smead, one or the other, stated to you they already had an arrangement in process with the Mid-States

(Testimony of Mark Hart.)

for the continuation of business on a prepaid commission basis, is that true? A. They did.

Q. His statement further goes on and states that, you stated if Lotz could not get Mid-States to write Lotz' business, that you, Mr. Hart, had another carrier in mind. Is that statement true or false?

A. That is untrue.

Q. Mr. Smead's statement says that you told Joe Lotz to tell Mid-States when they got to Chicago that he had been in New York looking for a better deal, but that the American Plan would not give it to Lotz, and so Lotz wanted to resume writing in Mid-States. Was any such statement as that made by you or was any such suggestion made by you? A. No, sir, there was not.

Q. Do you state in that connection that it was they who told you the deal that they already had in the making calling for a prepaid commission?

A. That is right.

Q. Just pausing on that for a minute, is a prepaid commission customary in this retrospective plan of operating? [687]

A. I would say it is the exception rather than the rule.

Q. He states in the statement of December 6th, Mr. Smead, that Hart told Lotz to call him immediately from Chicago so that Hart would know if Mid-States was willing to go along, and that you, Mr. Hart, gave Lotz your home telephone number. Is that statement true?

(Testimony of Mark Hart.)

A. That is untrue. I went out of town right after that meeting.

Q. Did you make any request of either Lotz, that is, Mr. Lotz, to call you or notify you of the outcome of his meeting in Chicago?

A. No, I did not.

Q. Mr. Smead says in his statement that you arranged travel for him to return to Oakland and also for Mr. Lotz to go to Chicago the following morning?

A. Yes, sir, I did. That is a courtesy we extend to all visitors.

Mr. Garrison: If the Court please, I move that that last be stricken out as not responsive to the question, a purely voluntary and self-serving statement on Mr. Hart's part.

Mr. Bronson: About the courtesy?

Mr. Garrison: About the courtesy extended to his office.

Mr. Bronson: That is all right, if you want it to go out. [688]

Q. But you did make those arrangements, did you? A. Yes, sir, I did.

Q. His statement also says, Mr. Smead's, that he went back to California and that on the 15th or 16th of August—that would be removed by that from the 13th—collections were not good, so he received from Mr. Hart that Mr. Hart and Mr. Feller would come to California on August 20th. Is that a true statement?

A. I do not know if that date is correct, Mr.

(Testimony of Mark Hart.)

Bronson. It seems to me that it was the 17th of August, but I may be incorrect, when he received word from my office—I was not in the office then—that I was coming with Mr. Feller.

Q. What was the situation? Did you plan to go solely to see those people when you came to California?

A. I did—not solely. We had some arrangements to consummate on another matter in Los Angeles.

Q. When you say “we” you refer to whom?

A. I asked Mr. Feller to come along with me.

Q. Was that some other business—

A. Some other business in Los Angeles, yes, sir.

Q. Were there any conversations between the time that you had this meeting in New York on the 13th and the time that you arrived here in Oakland on the 20th between you and Mr. Smead or you and Mr. Lotz about the progress of collections on your account? [689]

A. I don’t believe so, not with me personally.

Q. Any with your office that were brought to your attention?

Mr. Garrison: Pardon me, I did not hear your question.

Mr. Bronson: I asked him if there were any conversations back and forth between the 13th and the 20th of August, and the answer was “Not with me personally.”

The Witness: I am not quite certain of those dates.

Mr. Garrison: I beg your pardon?

(Testimony of Mark Hart.)

The Witness: The dates are a little hazy to me. I doubt it was, because my recollection is I was out of town during that period of time.

Mr. Bronson: Q. When Mr. Smead left to go to Oakland from the meeting on August 13th, had he made any representations to you about collections and his own activities in collecting on your accounts? A. Yes, sir, he had.

Q. Did you get any report on that, either directly or through anybody in your office, emanating from Smead as to the success that he had had in that regard?

A. I believe that on August 17th or thereabouts Mr. Will, our vice-president and treasurer, received information from Mr. Smead to the effect that he was only able to collect about \$8,000.

Q. Was there any report in that interval of time about what success they had had in making a loan? [690]

A. Yes, they felt that the loan situation did not look favorable.

Q. What, if any, influence did those two disclosures have in your making a trip out to Oakland on the 20th?

A. Well, it gave me some cause for concern, which I had not had heretofore, heretofore meaning the meeting of August 13th, and I thought it would be best, since I was going to California, to go to Oakland first.

Q. Going down Mr. Smead's statement he says—this is the December 6th statement—that during the

(Testimony of Mark Hart.)

\$50,000 loan, while you were out here? I am going to interrupt a moment to say that the last thing that had come to your attention was some information given to Mr. Will that they were not having much success with their loan. Was that before you got there? When you got out here with Mr. Feller? Just state briefly the activities of yourself and Mr. Feller on that loan.

Q. When I got out here the first thing we found out was they were talking about a loan of \$50,000 instead of a loan of \$100,000. I did learn that Mr. Mead was trying to arrange the loan for them, and I did volunteer to go over to the bank with our counsel, Mr. Feller, and execute any [693] documents with the bank to indicate our willingness to assign commissions due Mr. Lotz to the bank as collateral security in consideration for that loan.

Q. Stopping you there, under your arrangement with Lotz he earned a 20 percent commission?

A. That is correct.

Q. Loss ratio high, loss ratio low, and he could assign, or rather you could assign and agree to assignment, his assignment to the bank of that 20 percent as collateral, right?

A. That is correct.

Q. What happened at the bank when you put that up?

A. Mr. Feller and I met with the loan officer and it boiled down to the question of whether the collateral would be diminished by subsequent—

Mr. Garrison: If the Court please, I think we

(Testimony of Mark Hart.)

are getting into the realm of hearsay. I think we stipulated the loan was not made, if the Court please, and that is the ultimate fact.

Mr. Bronson: Yes, you are hurrying me a little, counsel. If you will just state what was said, rather than it boiled down to this. That is not a fact.

Mr. Garrison: We object to what was said between Mr. Hart and somebody at the bank because unless we were present, it would certainly be hearsay as to us, if the [694] Court please.

Mr. Bronson: I do not agree with counsel, but I think I should ask this.

Q. Was anyone else there besides the bank officer, you and Mr. Feller? Was Mr. Lotz and Mr. Smead there, in other words?

A. I don't believe Mr. Lotz and Mr. Smead were there. Mr. Feller and Mr. Earl Smith, assistant vice-president of the bank, the loan officer and myself.

Q. Were you successful in getting a loan or, rather, securing a loan for Lotz?

A. Ultimately no, but when we left the bank we had no way of knowing.

Mr. Garrison: If the Court please, I move that the statement be stricken out on the ground that Mr. Hart is self-serving himself by this voluntary statement.

The Court: The ultimate fact is they did not get the loan. The rest may go out.

Mr. Bronson: Q. When you got there did you make any examination of the books of the Lotz agency? A. No, I did not.

(Testimony of Mark Hart.)

Q. Did Mr. Feller? A. No, he did not.

Q. Did you engage anyone, whether in Lotz employ or an outsider, to attempt to get a current statement off the [695] books of Lotz?

A. No, sir.

Q. Mr. Smead's statement contains this statement. He says when you were there, and before you left, an envelope, sealed envelope marked "personal" containing a letter and a check for \$1,000 was handed to Mr. Smead, is that true?

A. Yes, that is true.

Q. Had the agreement of August 22nd been executed at that time? A. Yes.

Q. That was the arrangement, the exhibit that is in evidence here?

A. Yes, sir, it was.

Q. Where was that agreement signed?

A. At the office of the Central Bank in Oakland.

Q. Was a copy of it left there?

A. Yes, sir, it was left with Mr. Smith.

Q. Had this letter and check been drawn up at that bank or was that done aside from that proceedings?

A. There was no check, Mr. Bronson.

Q. What was it? A. A letter.

Q. Wasn't there an offer of \$1,000 in there?

A. Yes, that is right. [696]

Q. It was not a check?

A. It was not a check. It was an offer.

Q. What was the reason that you sealed that and handed it to Mr. Smead?

(Testimony of Mark Hart.)

A. Mr. Smead was an employee of Mr. Lotz, and I thought it would be rather delicate for Mr. Smead, for his employer to know we were giving him extra compensation for the extra work he had to do.

Q. Did you ask him not to show it to Lotz?

A. No, sir.

Q. What was the nature of the extra work you anticipated Mr. Smead would have to do?

A. Well, primarily we appointed Mr. Smead to supervise our funds, insofar as Mr. Lotz' office was concerned, which we felt would entail a considerable amount of extra work on his part, perhaps involving even night and weekend work, and we felt it fitting and proper to reimburse him for that work.

Q. Mr. Smead's statement in respect to that says that there had been no previous discussion of this matter of reimbursing him for the extra work cast on him in supervising your accounts here, is that true?

A. I believe he is correct in that we did not discuss reimbursing him, other than the night before we did ask him, did tell him that we would like him to handle our business [697] for us.

Q. With reference to the fact that he called you up when you were in Los Angeles and said he would not accept your offer of \$1,000, is that true?

A. Yes, that is true.

Mr. Garrison: I think the statement was that he would having nothing whatever to do with it, Mr. Bronson.

Mr. Bronson: Yes, but I heard Smead say that,

(Testimony of Mark Hart.)

and you will pardon my doubt of the veracity of the man when it comes to putting conversations like that.

Q. Next Smead says that the rewrite of the Public Service policies in Mid-States did not occur until the first week in September, and that you called numerous times and wanted to know how long it would take to rewrite the business and when you could expect the money from them. What is your comment on that part of Mr. Smead's statement?

A. I think in essence that that is a correct statement, but any reference made by me to Public Service money was made with respect to Lotz' commission thereon, which we wanted.

Q. You terminated the agency arrangement with Lotz while you were here, did you not?

A. Yes, sir.

Q. And you have seen the letter here that terminated it? A. Yes.

Q. What were your reasons for terminating the agency [698] arrangement with Lotz?

A. By the time I arrived here I was—or when I arrived here, rather, I was informed that Mr. Lotz had consummated a new agency agreement with Mid-States which called for a prepaid commission of 15 percent and a 14 percent retention. Our retention was 15 percent with no prepaid, although we did have the 20 percent guarantee unearned premiums. We could not give the prepaid commission because it is not within the scope of our manage-

(Testimony of Mark Hart.)

ment contract, and hence I felt that to continue along with Mr. Lotz would result in our probably getting a portion of the business that would be the unfavorable portion. I didn't want to leave ourselves in that position.

Q. Your 20 percent commission guarantee is payable not at the writing of the business, is it?

A. No, sir.

Q. How is it payable?

A. It is paid on an earned premium basis on exactly the same way that the retrospective commission is calculated.

Q. Did the fact that the loan that you had expected, first in the stated amount of \$100,000 and later in the amount of \$50,000, had not matured, have a bearing on the cancellation? [699]

A. On the termination of the agency agreement?

Q. On the termination of the agency agreement.

A. Yes, I think that influenced me, too.

Q. What is the policy of your Company, if you have any, about having an outstanding agency arrangement where you expect no business or expect highly substandard business?

Mr. Garrison: That is objected to on what the policy of the company might be is immaterial. The issue here is what did they do with respect to Mr. Lotz.

The Court: We are going afield, aren't we?

Mr. Bronson: Q. I asked you sometime ago about this \$50,000 loan that failed at the bank while you were here. Was there subsequently an advance

(Testimony of Mark Hart.)

made, at least as a credit, to Mr. Lotz, to tide him over by the American Plan?

A. Yes, sir, there was.

Q. How much was the amount of that credit?

A. It came down to \$38,000 or \$39,000, rather than the \$50,000 which we thought we would need to satisfy our company, that is the American Fidelity and Casualty Company.

Mr. Garrison: I move that the latter part be stricken out, if your Honor please. It is not responsive to the question. The question was, as I understood it, how much was the loan actually, and he said \$38,000. That, I think, is the answer. The latter part then is an explanation of what he did.

The Court: It may go out, what he thought.

Mr. Bronson: Q. Mr. Hart, was that handled by paying cash to Mr. Lotz? A. No, sir.

Q. How was it handled bookwise?

A. We actually credited Mr. Lotz with the \$38,000 or \$39,000, it may have been, and that, together with the \$24,000, which he paid us out of his trustee account while we were here and a previous commission due him of \$4,300, made up his May balance of \$66,000, which was due to us from the American Fidelity and Casualty Company.

Q. In other words, the American Plan owed the American Fidelity and Casualty that much money for the settlement of the May balance of Joe Lotz to that company, is that true?

A. May I qualify that?

Q. Yes, go ahead.

(Testimony of Mark Hart.)

A. I should not have said that American Plan owed it. Actually we are only responsible to the Company for what we collect. But the insurance department of the State of New York does not permit an insurance company to take into consideration any receivable that is in excess of 90 days old, and in order that the insurance company might not have a non-admissible item of this nature, American Plan advanced the \$38,000 so that we could pay the entire [701] \$66,000 to American Fidelity and Casualty Company.

Q. Pursuing Mr. Smead's December 6th statement, he next says that Hart instructed him to deposit any checks received from the Public Service business to Lotz trustee account and then issue a check to American Plan from that account. What is the fact in that respect?

A. That is not true.

Q. Did you give him any instructions about Public Service money? A. None whatsoever.

Q. He states next in his statement that Lotz and he told you, Hart, that they would owe Mid-States \$29,000 on September 15th for settlement of June business and that you, Hart, wanted it paid. What is the fact in that regard. Was that subject discussed between you and Smead?

A. Yes, we did have a discussion about that. He informed me that he had a \$29,000 balance due Mid-States and asked me what to do about it, and I said, "If you owe it to them, you will have to pay it."

(Testimony of Mark Hart.)

Q. From the time you left Oakland on the 20th of August up to that date, which must have been near September 15th, the settlement date, on the \$29,000, had you been communicating either by teletype, telephone or telegram with Oakland, with Lotz' office? A. Yes, sir. [702]

Q. Will you tell the Court how many times, weekly or daily, you called them during that interval?

A. Oh, I can't put my finger on it. At least once a day and sometimes as many as three times a day.

Q. Were you riding hard? Were you pressing them? A. Yes, I was.

Q. Were you trying to collect your balance?

A. Yes, sir.

Q. Were you meeting resistance on their end of it?

Mr. Garrison: That is objected to, if the Court please. The teletypes speak for themselves. It is a conclusion on his part. I think the Court is going to have to decide how hard he was pressing him.

Mr. Bronson: The teletypes are not the whole story. The witness has just said, as I understood him——

Q. Did you telephone besides teletype?

A. Yes, there were many telephone calls.

Q. Did you send wires?

A. I believe there were some wires.

Q. You were trying to to get your balance collected, is that right? A. Yes, sir.

(Testimony of Mark Hart.)

Q. On a debtor, relations with whom had ceased and terminated on August 22nd?

A. That is correct. [703]

Q. About this \$29,000, did you have any idea in your mind about lulling Mid-States into a further state of somnolence by letting Lotz feed \$29,000 to him?

A. I had no ideas along those lines whatsoever.

Q. Mr. Smead closes his December 6th statement by saying that about November 1st he telephoned to you about the \$60,000 balance that was then owing by Lotz Agency to American Plan and asked about the policy of reinsuring that amount with Mid-States, and he further says, Mr. Smead does in his statement, that you told him that under the New York law reinsurance was not permissible. Now, up to that point in this part of Mr. Smead's statement is it true or false?

A. I believe that is true.

Q. What is the situation that prevents reinsurance as distinguished from rewriting insurance under the New York law?

A. Mr. Bronson, it does not actually prevent it, but a New York Company that seeds all or part of its business with a company not authorized to do business in New York is penalized to the extent that the liability for unearned premium reserve is not permitted to be reduced and hence it is a punishment to surplus. So in essence insurance companies in New York desist from reinsuring with non-admitted companies. [704]

(Testimony of Mark Hart.)

Q. I take it from that that Mid-States was not admitted in New York?

A. It was not at that time, I do not believe.

Q. Mr. Smead goes on in that regard and says during a telephone conversation that you suggested that the \$60,000 or \$61,000 be rewritten in Mid-States and that you told Smead to call Hatfield in Chicago to arrange it. Is that a true statement?

A. Not exactly.

Q. State what happened in that particular regard, the telephone call to Hatfield?

A. This telephone call that I made to Mr. Smead was one in which I told him that there were some 60 or \$70,000 of remaining balance left, of unpaid balance remaining. He told me that they were not able to pay, but he said, "I have had some conversation with Mr. Hatfield about reinsurance. I said, "We can't reinsure for the reasons I have just given you, although I didn't get technical with him, but on a rewrite basis it would be all right." Then he said, "I am sure it is all right with Mr. Hatfield." And I said, "I can't do that unless I first clear with Mr. Hatfield and get his authority to cancel and rewrite."

Q. Is that the basis for the telephone call that you had with Mr. Hatfield that was read earlier in this trial, the one that is on a disk, and the transfer to the disk is dated [705] October 31st, 1951?

A. Yes, sir, that is the basis for it.

Q. And the conversation that you had with Mr.

(Testimony of Mark Hart.)

Hatfield there transpired out of those circumstances? A. Yes, sir.

Q. That bunch of policies that were cancelled were cancelled flat, were they?

A. That is correct.

Q. And if they had an unexpired term, the new policy was to be written to pick up the balance of the terms specified in the old policy, or did they revert back to the beginning of the period?

A. A flat cancellation means a cancellation from inception date. So the Mid-States policies were to take up from the inception date.

Q. Is that the group of policies that was referred to by Mr. Titus here this morning in a conversation he had with you early in December?

A. Yes, sir.

Q. Is that the first time that you learned that the cancellation notices of those policies had gone out to the various policyholders but had not been accompanied or even followed by the new policies?

A. You mean my conversation with Mr. Titus?

Q. Yes. [706]

A. No, I heard that on the same day from Mr. Smead, prior to Mr. Titus' telephone call to me.

Q. Let me ask you this: Had you heard from any of the policyholders?

A. Oh, yes, we had several complaints from policyholders and sub-agents wanting to know why we did not cancel their policy and replace it with a Mid-States policy.

Q. So it was a live question whether they were

(Testimony of Mark Hart.)

going to do what Mr. Hatfield said they were going to do or whether they were going to sit on it?

A. Yes.

Q. When reference was made by Mr. Titus about some trouble you might get into with the California Insurance Department, you recall that part of the conversation, do you? A. Yes, sir.

Q. Was that a live question too? Would that be a matter of interest to the Commissioner here?

A. I think that would be a matter of interest to the Commissioner.

Mr. Garrison: May the latter answer go out for the purposes of making an objection, your Honor?

Mr. Bronson: All right. I know Mr. Garrison, having been an insurance commissioner, can probably answer that.

Mr. Garrison: That is quite beside the point, but the [707] question was leading and suggestive and calls for an opinion about what the Insurance Commissioner might think, which would be wholly irrelevant in this case.

The Court: It may go out.

Mr. Bronson: I think that is right, but I want to ask the witness this:

Q. As a matter of your experience, thirty years in this business in a good many States in the Union, in your opinion, would the cancellation of a policy and then a long delay in issuing the rewritten policy be a matter of concern to an insurance commissioner?

A. My experience is, yes, it would be.

(Testimony of Mark Hart.)

Q. What about the poor policyholder? Would it be a matter of concern to him to get a notice, for instance, on October 31st that his policy was cancelled and then go down to the end of December and not have your new policy? Would that be a matter of concern to the policyholder?

Mr. Garrison: That is objected to on the ground it is totally incompetent, irrelevant and immaterial, to determine whether or not there was fraud committed in this case, the state of mind of the holders of policies.

Mr. Bronson: I do not know who committed the fraud.

Mr. Garrison: The Judge will decide that, but that seems to me to be totally without the issues of this case.

(Question read.) [708]

The Court: The objection may be overruled. You may answer.

A. It would be a very serious matter of concern to the policyholder, I should think.

Mr. Bronson: Q. Mr. Smead has said here, in one of these statements, that you told him to destroy the teletype messages that you had sent out here, is that true? A. That is untrue.

Q. As a matter of fact, they were not destroyed, Lotz' copies, were they?

A. Not to my knowledge.

Q. And yours were not destroyed, were they?

A. No, sir.

Q. When you got a copy of an order of this

(Testimony of Mark Hart.)

Court to deliver up certain documents within the period beginning before and ending after, you delivered your own teletypes to the attorney for the Mid-States, did you not?

A. Yes, sir, I did.

Mr. Bronson: That last statement of Mr. Smead's was in that amendment of December 7th, the short one, your Honor. Now I am turning to Mr. Smead's statement of December 18th, 1951, in which he says that on August 20th,

"When you came out here from New York with Mr. Feller, and while you were in Mr. Lotz' offices, you asked me to furnish you the figures showing the [709] total premiums payable to our companies and total receivables," and that Smead spoke to the three bookkeepers mentioned, and that a tape was run to furnish the information, which was total premiums payable \$287,000, total receivables, \$75,000. What is your comment about the truth or falsity of that statement?

A. That is not a true statement.

Q. Is there any explanation that you would care to make in that connection?

A. I would like to.

Q. Go ahead with it.

A. I asked Mr. Smead to furnish me, not with a tape, but with a listing and a breakdown by sub-agents of the receivables that were due his office.

Q. On what business?

A. On our business, the American Fidelity and Casualty business. I did this so I could take it back

(Testimony of Mark Hart.)

to New York, and in the event Mr. Smead was not successful in collecting or not aggressive enough in collecting from the sub-agents, that we would attempt to collect——

Mr. Garrison: I move, if the Court please, the reasons why he did it be stricken out as not responsive to the question. He was instructed to confine his testimony to the conversation with Mr. Smead. What might have been motivating him is something that I do not think he ought to interpret. [710]

Mr. Bronson: I know of no such rule of law, your Honor. If there is anything of assistance to the Court in determining——

The Court: The Court is prepared to rule. If he wants to explain his answer, he may.

The Witness: I wanted this listing of receivables broken down by sub-agents so that we from New York could effect a cancellation—I am sorry—effect collection of these items in the event that Mr. Smead was not aggressive enough in doing it, and failing to collect, we could cancel the various items.

Q. Did the breakdown of the information that you have just mentioned refer to any particular sum of money that was then due you from the Lotz Agency? A. Well, yes.

Q. What was the sum then due?

A. \$240,000 less whatever he had remitted to us between August 13th and August 20th, and I think it was about \$8,000.

Q. Mr. Smead's December 18th statement makes this statement, that on August 21st, during that

(Testimony of Mark Hart.)

same year, you asked him to compile a list of policy numbers, names of insured, amount of premium and individual agents; the unpaid American Fidelity refers to those receivables, and that this information [711] was compiled by the two women mentioned, and that Smead recalls that the total receivable was \$51,000. What do you say as to the truth or falsity of that? A. That is untrue.

Q. You stated that you recollect asking for a breakdown by policy numbers and insureds.

A. No, sir.

Q. You wanted to know the names of the agents for collection purposes? A. That is right.

Q. Was any breakdown of policy numbers, the names of the assured given you there?

A. No, sir.

Q. Was any tape run on the amount of total premiums payable and total receivables?

A. No, sir.

Q. Was any statement or any figures supplied to you by Smead showing that the total receivable figure was \$51,000? A. None whatsoever.

Q. What was the total receivable at that time, according to your calculation, referable to American Fidelity and Casualty?

A. I do not know the exact amount, Mr. Bronson, but it was \$140,000, according to their statement of August 13th, less whatever they had collected between August 13th and the date I was out here. [712]

Q. Now I am referring to the long typewritten

(Testimony of Mark Hart.)

statement taken in Mr. Garrison's office which is undated but apparently followed within a day or two after those I have referred with the December 6th and 7th dates. That statement says between December, 1950, and September, 1951, practically all the business written by Lotz was placed with the American Fidelity. Is that true?

A. That is untrue.

Q. The statement says that it was at your insistence that most of the business was placed with the American Fidelity. Is that true?

A. It is untrue.

Q. Did you make any statement on that subject to Mr. Lotz? A. Yes, sir, I did.

Q. What did you tell him and when?

A. In May of 1951, my first meeting with him.

Q. What did you tell him?

A. I told Mr. Lotz that we were not premium hungry, that we did not want all the business that he had, and that he should split with Mid-States. He told me that he preferred our company. He liked the way we did business. Nonetheless, I said, "Mid-States was your first carrier. We don't want all your business."

Q. Did you have any communication with Mid-States through Mr. Cass or any persons before you started writing business [713] on that subject?

A. Along those lines, yes, sir.

Q. The statement refers to the history of Lotz' bank account. I am referring to the statement that was made in Mr. Garrison's office. It refers to the

(Testimony of Mark Hart.)

history of Lotz' bank account with the Anglo, next with the Central, and then with the Anglo again. Do you remember that part of the statement?

A. Yes, sir.

Q. Did you ever have any knowledge of the change in the trustee account in the Central Bank over to the Anglo Bank, which apparently was made sometime along the end of August, 1951?

A. I never had any knowledge of that until this action was started.

Q. And that was the action brought by Mid-States against the Anglo on some checks that were claimed to have been cashed without proper authority?

A. Yes, sir.

Q. That is the first you knew that there had been a switch of the trustee account from the Central to the Anglo, is that right?

A. To my best recollection that was the first time.

Q. Is that referred to in the agreement that you had made with Lotz on August 22nd? There is a reference in there, [714] isn't there, that he has to retain his account in the Central Bank as a trustee account?

A. That is correct.

Q. There was no attempt made to seek your consent to that, then, prior to making the switch in the account?

A. No, sir.

Q. The statement contains then, that on August 20th Mr. Feller and yourself arrived in Oakland and made a thorough check of the books of the

(Testimony of Mark Hart.)

agency. I believe I have asked you about that already. A. You have, and it is untrue.

Q. Did you make any check on any of its accounts? A. None whatsoever.

Q. Did you take a look at them sufficiently to know whether his accounts were being kept up or badly behind? A. No.

Q. The statement says that at the time the \$66,000 for May, that is, due to your company, was still unpaid. That refers to the time that you came out here to Oakland?

A. I believe that is correct.

Q. And that was a balance that had fallen due, that is, the May business, on August 15th?

A. That is correct.

Q. And so it was about five to seven days overdue at that time? [715] A. Yes, sir.

Q. Does the same comment apply to the \$6600 due on the reinsurance transaction?

A. That was still unpaid.

Q. That statement says that you and Mr. Feller, when you were in Oakland, advised of the proposal to rewrite the business of the Public Service and the fact that the premiums therefrom would be used to reflect Joe Lotz' balance due American Fidelity; is that statement true?

A. It is partially true. We were advised of the Public Service rewrite, but nothing was talked about using their premiums for our balance.

Q. Did you propose that they invade the pre-

(Testimony of Mark Hart.)

miums, that is, the prepaid commission that they got out of it, to pay the account with you?

A. I did not.

Q. Did Mr. Feller do any such thing?

A. No, sir.

Q. He says in there, too, Mr. Smead, this again, that you were not to let Mid-States know of your part in that transaction, is that true?

A. That is untrue.

Q. Did you have any part in the transaction?

A. None whatsoever.

Q. Mr. Smead's statement says that you had instructed him [716] and Lotz to deposit all funds received from Public Service, and it has the same thing about washing premium payments from Public Service through the trustee account in the American Fidelity in the same bank and then to divert it to you, is that statement true?

A. That is untrue.

Mr. Bronson: Those are brief, your Honor, because many of the statements are covered in the previous one. I am going to take up these teletypes, but I will defer that and go into something else here. That will utilize too much time.

Q. Some reference has been made in the testimony here to a sum of around 10 or \$11,000 on the runoff of the Joe Lotz business with American Fidelity and Casualty that is due to Joe Lotz. Do you recall that testimony?

A. I do recall it, yes.

Q. Is it true that there was on the runoff of the

(Testimony of Mark Hart.)

business itself a balance of that amount resulting from the audit of the books?

A. That is correct.

Q. Were you informed at any time after the runoff or before that Joe Lotz had made an assignment of his entire affairs to the Mid-States sometime in the latter part of the years 1951?

A. Yes, I believe that counsel for Mid-States sent us a [717] copy of that assignment.

Q. Did he accompany it with any letter indicating that it was to put you on notice that any funds in the hands of your company that belonged to Joe Lotz or might belong to Joe Lotz, they claimed it under the assignment?

A. I believe a letter of that type did accompany the assignment, yes.

Q. Have you learned at any time since the date that that assignment bears Joe Lotz repudiated the assignment and claimed any funds in your hands belonged to him as his own?

A. Yes, Mr. Lotz' attorney notified us that the assignment had been repudiated.

Q. And you have been holding that amount since? A. Yes, sir.

Q. Have you informed any official of Mid-States of that fact?

A. I am not certain but I seem to recall that I did.

Q. Additional to that are there any charges that you assert under the August 22nd, 1951 agreement or otherwise against that fund?

(Testimony of Mark Hart.)

A. Yes, sir, we assert charges for any legal right we may have to offset against that fund.

Q. So there are in effect about three claims on that fund. Is that about the fact of it? [718]

A. Yes, sir.

The Court: We will take a recess.

(Recess.)

Mr. Bronson: Q. You have stated, Mr. Hart, that when you got out here on August 20th, 1951, there was the balance owing by the Lotz Agency to American Plan of approximately \$240,000 less about \$8,000 of collections that had been effected in the week intervening between the New York visit and that date. Now, when you were in Oakland with Mr. Feller and were seeing Mr. Lotz and Mr. Smead, was there any discussion between you and them, and any plan formulated for the pay-off of that amount of something over \$230,000, and was anything done for payment on account immediately? Will you discuss that as briefly as you can, if there was such a discussion and plan?

A. As I recall, Mr. Bronson, during our visit, Mr. Lotz had a balance in his trustee account of approximately \$30,000, and he gave us \$24,000 of that \$30,000. The receivables were purported to be \$140,000 and that, when added to the \$24,000, made \$164,000, which when deducted from the \$240,000 that he owed us, left about \$76,000. We had created in New York a commission credit to Mr. Lotz of \$20,000.

Q. That was in the normal system of accruals?

(Testimony of Mark Hart.)

A. Yes, as commission earnings, which brought the balance [719] down to \$56,000. It was my thought that this \$56,000 could be liquidated in several ways: One, by virtue of the commissions he was receiving under his original retrospective contract with Mid-States, which he told us was running about \$9,000 a month.

Q. His commissions?

A. Yes, sir, as retrospective commissions, that Mid-States, he told us, was running about \$9,000 a month. Two, from the 15 percent prepaid commission earnings on Mid-States business; three, from the fact that a loan was still in process of negotiation; and finally he had an equity in our unearned premium reserve of some \$60,000. All of that would more than normally liquidate, more than adequate liquidate the \$56,000 that remained as a result of this calculation.

Q. Would any arm of that scheme or system of liquidation involve an invasion of the premium accounts of Joe Lotz with other companies?

A. No, sir, it would not.

Q. I may as well ask you this: Was there ever any suggestion made by you or Mr. Feller, statement, verbal or in writing, that to pay you off, you required Joe Lotz to invade premiums belonging to other companies?

A. No, sir.

Q. Now, the Court has among the exhibits a series of teletypes. Before I go to that, however, and on the subject [720] of the switch in the account from the Central Bank to the Anglo Bank, I will

(Testimony of Mark Hart.)

ask if you know of the communications sent to Joe Lotz by letter from the treasurer of your organization under date of August 2nd with respect to the use of the account in the Central Bank, that testimony has been taken on, that is, the account standing in the name of the American Fidelity and Casualty Company. Do you know of such a letter?

A. I think I am familiar with that situation.

Q. I will show it to you in a minute. As a matter of fact, when first was that account established, the one standing in the name of American Fidelity and Casualty?

A. I am not sure of the date, Mr. Bronson, but it was perhaps in April or May, 1951, when we opened up a complimentary account at the Central National Bank in the name of the American Fidelity and Casualty for a round sum. I believe it was \$25,000. And, as I say, it was complimentary to Joe Lotz with the bank.

Mr. Garrison: If the Court please, I move that the present voluntary aspect of his answer be stricken out on the ground it is not responsive to the question as to the date when it was opened.

The Court: It may go out.

Mr. Bronson: It can go out as to that part.

Q. That account had stood in that amount or the approximate [721] amount you mentioned for several months before the date of the letter I'm handing you?

A. Yes, sir.

Q. Can you identify that as a letter with which

(Testimony of Mark Hart.)

you are familiar sent to Joe Lotz on the date I mentioned? A. Yes, sir.

Mr. Bronson: I ask that that be marked, please.

The Court: It may be admitted and marked.

(The letter above referred to was thereupon received in evidence and marked Defendant's Exhibit I.)

Mr. Bronson: I will read this with your Honor's permission. It is a carbon copy of a letter sent to Joe Lotz, 315 Fourteenth Street, Oakland 12, California. August 2nd, 1951.

"Dear Mr. Lotz:

"The American Fidelity & Casualty Company recently opened an account in the Central Bank at Oakland, California. This account was set up to enable you to deposit your American Fidelity & Casualty premiums in this account when due rather than forward the check to New York. We believe that this will work out to our mutual advantage.

"Your check for the full amount of the month's premiums that become due should be deposited in this account on the fifteenth (15th) day of the month. [722] The name of the account is "The American Fidelity & Casualty Company." Enough deposit slips should be sent to the bank to enable them to mail one to the attention of the Insurance Company in Richmond, Virginia and, one to our office here in New York.

"I would appreciate it if you would acknowledge

(Testimony of Mark Hart.)

receipt of these instructions and your agreement to comply therewith.

“Yours very truly, Treasurer.”

The initials at the bottom of the page on the left are “HAW”.

Can you tell us who that is?

A. That is H. Arthur Will.

Q. He was the treasurer of your Company at that time? A. Yes, sir.

Q. Were those instructions, the instructions contained in that letter, ever altered by your Company?

A. No, sir.

Q. That account is to be distinguished from the trustee account referred to in the August 22nd agreement with Lotz and with Smead that they maintained in the same bank, is that true?

A. Yes, sir.

Q. Was there a reason why—this is preliminary to these telegrams or teletypes that were referred to—was [723] there a reason why you set up an arrangement August 2nd for the deposit of the premium money coming to the American Fidelity & Casualty Company from the Lotz Agency, as set forth in the letter of Mr. Will's that I read?

A. Yes, there was a reason.

Q. What was the reason?

A. In July, some date in July that I do not recall, a check tendered us by Mr. Lotz in the round sum of \$50,000 or the sum of \$50,000 approximately was returned by the bank because checks he had

(Testimony of Mark Hart.)

deposited against it had not cleared. We did not learn of that for, oh, five to seven days, because of the banking channels between California and New York is quite slow. So since we had this account at the American Fidelity & Casualty Company at the Central Bank, which had been a dormant account, we felt that if we had Mr. Lotz deposit his premium funds direct to our account in Oakland instead of sending them to New York, it would save on the transmission time and the banking channel time entailed, and that in the event such a situation again arose, we would know immediately, so it was put in as a substitute for sending the checks direct to New York.

Q. I am not going to discuss all of these teletypes but only some of them. Now, the first one that I want to pick out is one dated August 30th appearing on page 6, as you have [724] numbered them, Mr. Garrison. I will follow your numbers when I refer to the page and I will read it. It was from you to Oakland:

“Have you received deposit slip covering commission checks in the amount of \$4,304.30 from Central Bank” dated 8/25/51.

“Answer: Yes, we have. Will advise you of deposits tomorrow. Ralph Smead.

“Minute. What about \$30,000 deposited 8/29”? Beneath, apparently under the same date, because there is no new date indicated, “How about funds of \$1,450 which you received last Friday? Also has

(Testimony of Mark Hart.)

check of \$30,000 actually been deposited at bank A.F.C. account. Go ahead.

“Answer: To both questions. (This presumably from the Oakland end.) Checks are all payable to Mid-States Insurance Company but waiting authorization required to deposit. We are advised by that Company that authorization has been forwarded to us. That is the only holdup. But has been definitely cleared after your telephone conversation yesterday with Smith. Everything is much better. Go ahead.”

Then apparently from your end:

“Understood Public Service checks were to be made payable to Lotz. Has this procedure been changed? [725] First check payable to Mid-States, however——”

This has been changed—I will read it as it is.

“First check payable to Mid-States. However, this has been changed, that if we do not receive authorization right away from them, we can have reissue day. Keep in touch. End.”

Will you state what you referred to in your question, “What about \$30,000”? The first time I read that figure, I read, “Has check of \$30,000 actually been deposited in bank,” as those two expressions appear in the portion read.

A. May I say immediately preceding that series of teletypes there was a telephone conversation. I do not know whether it emanated from Mr. Smead or myself, in which he told us that he had made a \$30,000 deposit. Having failed to receive either a deposit slip or a clearance from the Central Bank

(Testimony of Mark Hart.)

on it, I then teletyped him and asked him what about the deposit of \$30,000.

Q. Did you know where the \$30,000 was coming from?

A. He was supposed to be in the process of collecting on behalf of Mid-States the premiums applicable to the Public Service business.

Q. How much was the gross premium, as you understood it, out of this Public Service rewrite?

A. They told us it was \$150,000.

Q. What did 15 percent, their prepaid commission on that [726] business, amount to?

A. That would be \$22,500.

Q. That would be the larger portion of the \$30,000 which Mr. Smead referred to in a telephone conversation?

A. That is correct.

Q. Was the telephone conversation which you say you do not know who instituted, but that Smead mentioned \$30,000, was that the first time you had heard of \$30,000?

A. Yes.

Q. How long before the date of this first one I read, August 30th, did that telephone conversation take place?

A. I can't be sure, Mr. Bronson. It might have been two or three days.

Q. Was he receiving in the normal course of his business commissions, earned commissions on business from all of the companies for whom he was working during this period? I will put it this way, to make what I am getting at plain: Did you understand that the Mid-States business was the only

(Testimony of Mark Hart.)

source of revenue that the man had? A. No.

Q. Turning, if you will, Mr. Hart, to page 7, I omitted the wires or the teletypes there. Those are dated, the last date being 8/30, August 30th—this is dated August 31st to Mr. Ralph Smead—"Has check for \$30,000 been deposited in A.F.C. account as yet? Mr. Smead and [727] Mr. Lotz are in Los Angeles today (that is an answer) but they will call today. Will give them the message."

"Can you get in touch with them before 2:30 our time? Urgently know by then.

Answer: We should be in touch with them before that time. Will try. Okay. End."

That referred to the same matter, with the same explanation as to your meeting with those teletypes emanating from you? A. I believe they do.

Mr. Bronson: Page 8, Mr. Garrison. This is under date of September 6th, 1951. Thursday morning, 11:30 a.m., Joe Lotz, operator. Joe Lotz, Oakland, American Plan operator:

"Will appreciate your phoning address of Public Reinsurance Company. Will wait. Excuse. Should be Public Service Insurance Company. End." The same date, Joe Lotz, operator.

"The address is 10 Drumm Street, San Francisco. Amount of morning deposit to American Fidelity & Casualty account \$1,718. Mr. Smead is in San Francisco now working on Public Service account. End."

What was the purpose of your inquiry by this

(Testimony of Mark Hart.)

teletype of Oakland as to the address of the Public Service Insurance Company? [728]

A. Well, at this time or by this time I was beginning to suspect that perhaps Mr. Lotz' offices did not have a deal to rewrite the Public Service business in Mid-States, and since I was vitally interested in getting his commission in to help liquidate his balance to us, I had a thought in mind that we might clear with Public Service. However, we never did.

Q. You did not contact Public Service directly?

A. I don't believe we did, no, sir.

Mr. Bronson: Page 9, Mr. Garrison, dropping down to about a half-page:

"Tomorrow is deadline with \$190,000 unpaid."

And then apparently from the other end, "Be home after four o'clock your time."

Then from your end:

"Will contact you there later. End."

What does that \$190,000 unpaid refer to as the deadline?

A. May I have that date again, please?

Mr. Bronson: May we ask for that?

Mr. Garrison: September 14th.

Mr. Bronson: Where do you find that?

Mr. Garrison: At the top of the initiating message, American Plan, N.Y., 9/14.

Mr. Bronson: Oh, yes, September 14th is the date.

A. The agreement we made with Mr. Lotz under date of [729] August 22nd stipulated that all balances would be liquidated by September 15th. As a

(Testimony of Mark Hart.)

matter of fact, he wanted to make it the first of September, but we said no, the 15th, and this was the 14th. And I was just telling him that although tomorrow was the last day, he still owed us \$190,000, so he had only paid into us, either by cash payments or by commission credits, \$50,000 up to that point, 50 and 190 being the 240.

Q. You referred to the \$190,000 as the balance then due on the \$240,000 account as it stood when they came back to New York?

A. Yes, sir.

Q. By the way, I am going to digress a minute in respect to that September 15th closing, which is referred to in the agreement that you made with Joe Lotz when you were out here and when you cancelled the agency contract, the part of it that says he has to pay off all balances to the American Fidelity & Casualty on or before the 15th day of September. That would be a matter of about 25 days or something like that after the time the agreement was made. Did you expect to get paid out by September 15th?

A. No, sir, I did not. That was psychological. As a matter of fact, had we been paid by September 15th, he would have been pre-paying his August balance, which was not due until November 15th, and his July balance, which [730] was not due until October 15th.

Q. I am reading from the last message on the page:

“Is Mark Hart in, please?”

(Testimony of Mark Hart.)

"Yes, go ahead.

"Mark, you mentioned the other day that you were short a couple of deposit slips. Which ones? Go ahead."

Your answer:

"One for \$15,000, one for \$7,867 and, of course, today's. I suppose you received the one for Saturday. Go ahead.

"Is this the one for \$60,000? Go ahead.

"Right. Okay. Received. Go ahead. Guess that will do it. Will send others out right away."

What is the explanation of that exchange of messages?

A. May I ask you, Mr. Bronson, where it refers to \$60,000, is that me talking to Mr. Smead or vice versa?

Q. If I can come up here, with his Honor's permission, the date is 9/17. That is September 17th. It follows by three days the \$190,000 wire that he sent you. Then it says, "Is Mark Hart in." That is apparently coming from you in New York. And then the answer, "Go ahead." Then this says, apparently, whoever was sending the wire here, "Mark, you mentioned the other day that you were short a couple of deposit slips. Which ones? Go ahead." [731]

And then the answer from Oakland, "One for \$15,000——"

A. This is our answer.

Q. Whose answer?

A. "One for \$15,000" is our answer, Oakland.

Q.. You are telling him the ones that are short?

(Testimony of Mark Hart.)

A. Yes.

Q. "And, of course, today's. I suppose you received the one for Saturday." Who does that come from? Is that from you or from Oakland?

A. That is from Oakland, I presume.

Q. And then it says, "Go ahead." The next is, "Is this the one for \$60,000? Go ahead." "Right." That is the answer from Oakland?

A. Yes, I directed that question to Mr. Smead about the \$60,000.

Q. What explanation have you?

A. On September 17th he was still in process of collecting our premiums. I presume from that—I can only presume—that there was a previous telephone conversation.

Mr. Garrison: I move that the presumption go out, if your Honor please, on the ground that it is simply a self-serving statement.

Mr. Bronson: You can't guess about it. Counsel is right.

Q. I will direct your attention to page 11, Mr. Garrison, [732] the top of the page, September 21, 1951, Friday morning. Whoever typed this up said approximately 11:45 a.m.

"Joe Lotz, operator, Oakland, California, American Plan Operator, Mark Hart to Ralph Smead. Sorry for error in my figures. Actual balance to date \$105,969. American Plan Loan of \$50,000 reduced to \$39,003 by application of July and August commissions. Balance therefore \$66,955, but we

(Testimony of Mark Hart.)

would also like you to clear up amount due this organization of \$39,003."

"What is your specific reply to my urgent request for liquidation for Company's auditors arrive, and preferably within the next five days. End. Joe Lotz, operator."

"Mr. Smead and Mr. Lotz are now out to lunch. Will return in approximately one hour. Will advise you then."

Can you explain to the Court, please, the reference to the sums there and the significance of them in connection with the reduction of your balance at the date of that teletype on September 21?

A. Well, it appears that inclusive of the loan of \$39,000, which we advanced to pay the American Fidelity and Casualty, that there remains a balance of \$105,000 which seems to indicate that up to that point we have been either paid or we have credited Mr. Lotz' account with some \$135,000. [733]

Q. Does that indicate to you any circumstance or fact in connection with the contention that there was any invasion of the funds of Mid-States or any other company in the liquidation program up to that point?

A. No, that does not indicate that to me at all.

Q. I beg your pardon?

A. That does not indicate that to me at all.

Q. And the balance therefore on the date of the wire was \$66,955?

A. Well, that is considering our loan of \$39,000.

(Testimony of Mark Hart.)

Q. Exclusive of that? A. Yes, sir.

Q. With reference to the next teletype on the same page, Joe Lotz, operator, to Mark Hart, from Joe Lotz and Ralph Smead, "In reply to your teletype of this morning, will have approximate deposit Monday of \$30,000. We are going on loan for any balance. Will telephone you Monday morning. End or go ahead."

"Reply: Okay, will expect your call Monday."

What comment do you have with regard to "A loan for balance including your funds advanced by us" in the scheme of the discharge of your indebtedness?

A. The only inference I can draw from that is he is still collecting our premiums.

Q. What about loans? [734]

A. Well, he has said, and subsequently after that date, said on many occasions that the loan was in process, or the loan was approved, et cetera.

Q. Page 14, two-thirds down the page. "To Mark Hart from Ralph Smead, October 17th, 1951, Anglo Bank has approved the loan. Was in their head office in San Francisco most of yesterday. All that is necessary to do is to confer assignment. Mr. Hal Smith of that Bank will contact you immediately. Will have additional money for you also. End." American Plan Operator. End."

What put that on the date of October 17th and their use of borrowed money, bank money, to assist in the liquidation?

A. The only comment I have on that is we evi-

(Testimony of Mark Hart.)

dently were tickled to death that the loan had been approved.

Q. That did not involve the invasion of anybody else's premium funds if they got a loan?

A. No, sir.

Q. The next page, October 18th: "We are arranging loan of \$50,000 which leaves balance of approximately \$25,000, which balance will be paid within the next ten days at the longest. We are wondering if Mr. Hart has had any word from the Anglo Bank. Go ahead."

The answer says: "Mr. Hart is out of the office but he did tell us that you have been trying to arrange this loan for [735] two weeks. Do you have a definite commitment on loan. Go ahead.

"Yes, we do, and it is now only a matter of confirming the reserve figures with—I can't read the next word—we understand correspondence has already been addressed to the A/P office."

Still assuring you of a loan?

A. Yes.

Q. During all this time you were sending teletypes, telephone messages back and forth, as you said earlier today, daily or oftener, and insisting upon payment of your account, is that true?

A. Yes, sir, we were really pushing.

Q. Page 17, October 23rd. I will get to the point.

"Mark, we have definite arrangements for loan and will also have some additional money for you. Don't see any necessity for trip by auditors. Don't think their trip would bring any faster results. I

(Testimony of Mark Hart.)

feel confident the matter will be completely cleared up in a very short time. Believe me we are using all of our efforts on this problem and so I would not advise a trip by your auditors."

Answer by you:

"Have complete confidence you and Joe, but entire situation will pass from my control to Company auditor [736] unless substantial deposit apart from loan is made by Friday. If you can send us a good size deposit by Friday, I may be able to talk auditor out of going to Oakland and stirring up all kinds of trouble. This matter has reached the stage where Company might take drastic action and of course I am doing everything within my power to avoid same for Joe's sake. End. D.C.M. We appreciate your part, Mark, and believe me we will do our best. End. Quoting from my calculations you should be collecting about \$100,000 this month."

A. Yes, sir, it was.

Q. That is a part of your pressure and insistence upon payment daily? A. That is correct.

Q. Page 18, the next day, August 24th:

"Mr. Ralph Smead from Mr. Will. Balance to date \$66,010.07. End. Does that figure include September commission and return premiums. Go ahead.

"This message is sent by bookkeeper. I have taken the balance from our books. Mr. Will is out of office at present so cannot verify whether this included above items. Will call you as soon as I do know. Go ahead."

"Good. Will appreciate it. End."

(Testimony of Mark Hart.)

What is the significance of that exchange of messages. [737] Are you referring to the \$66,000?

A. Well, that simply is the balance that was left as of October 24th.

Q. And again does this figure include September commissions and return premiums — that is September commissions?

A. Presumably the 20 per cent guaranteed commissions for September on our business.

Q. Returned premiums refers to——

A. Credits due him.

Q. Reference has been made to the fact that you engaged in employment out here sometime before or after the first of the years, 1952 Ralph Smead in some capacity. Did you engage him?

A. Yes, sir.

Q. In what capacity?

A. I think we called him service manager with regard to the handling of the runoff of Lotz' business.

Q. At that time was he engaged at all for the purpose of producing business?

A. No, sir.

Q. For adjustments?

A. To some extent in supervision of adjustments, yes, sir, but it had to do with the runoff of business.

Q. It was still in effect up to and ending with the cancellation of the Lotz Agency by American Fidelity & Casualty? [738]

A. Yes, sir.

Q. Under what circumstances did you put Smead in there on that work?

(Testimony of Mark Hart.)

A. I came to Oakland, I believe, in January 1952, and I found that we were faced with an extremely difficult situation arising from the fact that Mid-States Insurance Company——

Mr. Garrison: If the Court please, it appears that we are getting into another one of these volunteer statements by Mr. Hart. It seems to me he should confine his testimony to conversations or statements of fact.

Mr. Bronson: I do not think so, your Honor. I have never heard of such a rule of law. I asked him the circumstances under which he engaged him. He cannot answer that by saying conversations. He has to recall the circumstances.

Mr. Garrison: He is not giving the circumstances. He is reaching into an explanation of what was in his mind and what the conditions were that are entirely self-serving.

Mr. Bronson: When a man gives a reason, he has to give it from his mind.

The Court: Read the question and answer.

(Record read.)

The Court: You may continue. The objection will be overruled.

The Witness: Mid-States Insurance Company had taken [739] over the office of Mr. Lotz——

Mr. Garrison: I move that be stricken on the ground that it calls for a conclusion whether or not they had taken over the office of Mr. Lotz.

Mr. Bronson: We already have the fact, every book and record in their possession.

(Testimony of Mark Hart.)

Mr. Garrison: It involves a legal interpretation by this Court.

The Court: Doesn't the record already disclose who took it over?

Mr. Garrison: We leased some space and we leased his equipment.

The Court: That is what he has in mind.

Mr. Bronson: You are not half telling the story. They took every record he had.

Mr. Garrison: In the sense of taking over, that is a legal maneuver, and of course, that would be a matter for the Court to pass upon.

The Court: I am sure you will cross-examine him on every detail. Proceed.

The Witness: Among the records of the Mid-States acquired from Lotz were voluminous batches of cancelled American Fidelity and Casualty policies, reports of losses, et cetera, and we were receiving numerous complaints about the non-payment of return premiums and the payment of losses, [740] but we felt that our hands were tied because we did not have these documents. Of course, when we requested Mid-States to give them to us they did, but by this time they had accumulated to such an extent that we had to put someone in here in the interest of serving the public to process these return premiums and losses, and Ralph Smead was the only logical man to turn to. I asked if he would work for us in disposing of these and any subsequent ones that arose.

Q. About how long was he engaged in the work

(Testimony of Mark Hart.)

of running off. if I can use the term. the services that you engaged him for?

A. I am not very certain of that. Mr. Bronson. The work did taper off gradually. but it seems to me sometime in the spring of 1953 it had practically eliminated itself.

Q. Did you at any time after January, 1952. enlarge his duties? A. Yes, sir.

Q. If so. when was it and what did it consist of?

A. It seems to me that sometime in possibly June or July 1953. the work in connection with the liquidation of the Joseph Lotz agency. insofar as servicing the public was concerned. had been practically eliminated. Ralph Smead called me and he said that he had an opportunity to go somewhere else for a job because this thing was practically washed up. but he said he would like an opportunity to produce [741] business for us. I decided to give him a chance to do so. and I asked him to come to New York to discuss it. We then made an arrangement appointing him Pacific Coast Manager and his duties then were strictly production. servicing. and supervision of our business primarily in the State of California.

Q. How long did that job last?

A. I think that we terminated that position in September or October, 1953.

Q. Who terminated it. he or you?

A. We did.

Q. Did you ever in the course of any of this period. following the statements he had signed to the

(Testimony of Mark Hart.)

Mid-States people when they were out here early in December, 1951, and at any time during his employment with you, ever ask him to repudiate those statements?

A. No, sir, I never endeavored to influence him.

Q. My question was did you ever ask him to repudiate them or change them in any respect?

A. No, sir, I did not.

Q. Did you ever tell him he would have to try to forget what he said in those statements?

A. No, sir.

Q. Please do not think I am trying to indicate more than the idea. Did you ever tell him at or before or during the [742] time that our office, my office, was engaged in respect of these matters under suit, that he was not to tell Mr. McKinnon any of the real facts of the case because Mr. McKinnon would then not want to represent American Plan or American Fidelity & Casualty?

A. I did not.

Q. Was any subject of that kind ever discussed or intimated between you and Mr. Smead?

A. No, sir.

Q. I will ask you by way of conclusion of this direct examination, Mr. Hart, whether with Mr. Lotz or Mr. Smead, from the beginning of the time that your Company engaged Mr. Lotz as agent, ever enter into any conspiracy with Lotz and Smead through you or through anybody else in your organization to invade premium funds of other compa-

(Testimony of Mark Hart.)

nies other than your companies for the payment of your account? A. I did not.

Q. Did you ever, or did anyone in your Company ever suggest, to your knowledge, a concealment to Lotz or to Smead of any fact of the Mid-States Company concerning your business with Lotz' Agency? A. No, sir.

Mr. Bronson: There may be some things I have forgotten, Judge. It is a long direct examination but I will conclude it now. I do not know whether the hour has any bearing. [743]

The Court: Maybe counsel wants to go on.

Mr. Garrison: If I did, I would be very unpopular, but I do not.

The Court: Very well. We will adjourn until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock a.m., Wednesday, May 12, 1954.)

The Clerk: Mid-States Insurance Company versus Anglo California National Bank and American Fidelity and Casualty Company, further trial.

Mr. Bronson: Ready. Will you step forward, Mr. Hart?

The Clerk: Mark M. Hart to the stand, heretofore sworn.

No. 14695

United States
Court of Appeals
for the Ninth Circuit

MID-STATES INSURANCE COMPANY, a corporation, and THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
Appellants,

vs.

AMERICAN FIDELITY AND CASUALTY COMPANY, INC., a corporation, AMERICAN PLAN CORPORATION, a corporation, MARK HART, JOSEPH LOTZ, RALPH L. SMEAD and L. SUDEKUM,

Appellees.

Transcript of Record

In Three Volumes

VOLUME III.

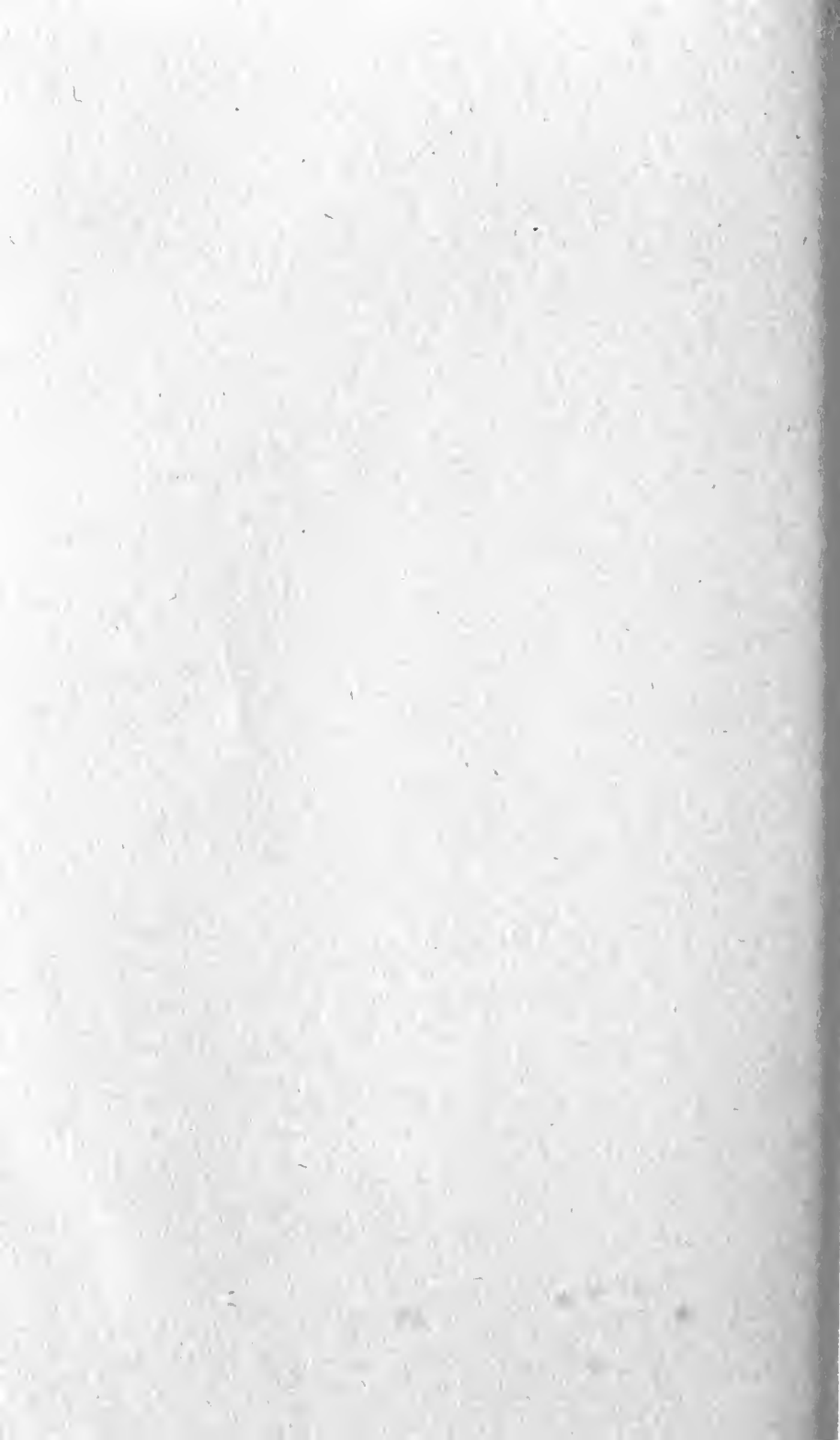
(Pages 821 to 1241, inclusive.)

Appeal from the United States District Court for the Northern District of California, Southern Division

FILED

JUL 20 1955

PAUL P. O'BRIEN, CLERK



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Appeal from the United States District Court for the Northern District of California, Southern Division

MARK HART

a witness called on behalf of the defendant, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Mr. Bronson: Q. Mr. Hart, Mr. Smead on the stand earlier testified on the subject of some bill for legal services of attorney, Mr. Dusky being paid by the American Plan—a bill to Mr. Smead. Is that a true statement?

A. No, that is not true.

Q. Did you have any conversation with Mr. Smead at any time on the subject of bills for legal services?

A. Yes, but not Mr. Smead's bills.

Q. Will you state when it was that you had a conversation?

A. I am not certain of those dates, Mr. Bronson, at this time, but I had several conversations with Mr. Smead in which he——

Q. (Interposing): When was that? What year was it? [746]

A. It seems to me it was the early part of 1952.

Q. Just state the conversation with Mr. Smead on that subject, please.

A. Mr. Smead informed me that Mr. Dusky was going to withdraw from representation of Mr. Lotz unless he received some money from some quarter, and he asked me if we wouldn't advance Mr.—against Mr. Lotz' account, advance Mr. Dusky the money.

Q. Did you do it?

A. We later did.

(Testimony of Mark M. Hart.)

Mr. Bronson: That is all. No, one question:

Mr. Bronson: Q. Did you have any request from any source, or any billing, on account of services of Mr. Dusky for Mr. Smead as distinguished from Joe Lotz?

A. Yes, subsequently Mr. Smead stated that he had a bill from Mr. Dusky, and I am not sure whether the amount was \$1500.00 or \$2500.00, and asked if we wouldn't pay his legal services, and we declined.

Mr. Bronson: That is all.

Cross Examination

Mr. Garrison: Q. You told us yesterday, Mr. Hart, that you commenced your career in the insurance business in the accounting field.

A. Yes, sir.

Q. And you were an assistant supervising accountant, I believe, [747] in your first position?

A. Ultimately I became assistant chief accountant.

Q. And that included accounting procedures involving agency operations? A. Yes, sir.

Q. And insurance company operations?

A. Yes, sir.

Q. And subsequently you went on to the supervising agency of the Globe and Rutgers Company.

A. Supervising agency accounts.

Q. Supervising agency accounts? So that was still in the accounting field?

A. That is right.

(Testimony of Mark M. Hart.)

Q. And then you have moved on into the executive bent and are now and have been for several years the president of American Plan.

A. Yes, sir.

Q. That has given you, over a thirty year period, a very broad and wide experience, and, indeed, insight into insurance accounting and insurance operations, I take it.

A. I believe so, yes.

Q. You first met Mr. Lotz, you say, in May?

A. May, 1951.

Q. And how do you fix the month of May as being the month you met Mr. Lotz for the first time? [748]

A. Well, I was out here on rather an extended visit with various accounts and prospects in this area, and since Mr. Lotz was a relatively new account I called him. I fix the time because I know when I was out here.

Q. He was at that time an agent for your company?

A. Yes.

Q. And producing business?

A. Yes, sir.

Q. Is that the first investigation you made of Mr. Lotz' operations?

A. It is the first investigation I personally made.

Q. Others had been made by others in your company, had they, of Mr. Lotz and his operations?

A. Well, we have a system of drawing a credit report on every new agent, which I assume was done at the beginning.

(Testimony of Mark M. Hart.)

Q. So when you appointed Mr. Lotz in the first instance you had some background of who he was and what he had been doing and how he had been getting along?

A. We had a retail credit report.

Q. Is that all you had? A. Yes.

Q. At any rate, when you made the appointment in the first place, you knew his credit period with Mid-States was twenty-five days, didn't you?

A. No, I don't believe we did know that. [749]

Q. At any rate, you gave him the maximum credit period you had for any agent, which was seventy-five days?

A. Certainly. That is the maximum period.

Q. It is what you give?

A. I said substantially. We have a few cases where we let them have eighty-five days. That is the maximum.

Q. There was nothing particularly wrong in giving him seventy-five days—a seventy-five day credit period? That is a practice in the business that is permissible if you want to do it?

A. For general agents, yes.

Q. You say he told you when he first saw you he had been operating on last month's writings to pay this month's bills?

A. He didn't put it in those words. I found him to be rather confused as to his interpretation of the retrospective plan.

Q. You said he used the term "float".

A. Yes, sir. If I may explain?

(Testimony of Mark M. Hart.)

Q. Well, at the moment just answer the questions, if you will? A. Surely.

Q. Unless you want to explain your answers. He did use the term "float"? A. Yes, he did.

Q. Did he explain what he meant by that?

A. Later he did, yes.

Q. What did he say? [750]

A. Well, I will have to explain.

Q. Go ahead.

A. I found his interpretation and conception of the retrospective plan to be——

Mr. Garrison: (Interposing) Well, I move to strike that if the Court please, as not responsive to any question.

Mr. Garrison: Q. Just tell us what he said it was and let the court determine.

Mr. Bronson: Pardon me. I thought you gave him leave to make an explanation.

Mr. Garrison: I asked him to give the conversation, if the Court please, and not his interpretation of the conversation.

The Court: Read the question please, Mr. Reporter.

(Question read by the reporter.)

The Court: Go on.

A. I found his interpretation of the retrospective plan to be somewhat erroneous. He thought the basis of it was a float. The first time, incidentally, I have heard this word used.

At that time he told me he was—his idea of a

(Testimony of Mark M. Hart.)

float was that he could hold the money and use it for operating expenses, et cetera.

Mr. Garrison: Q. And you told him that was an unscientific and unwise course.

A. Yes, I did.

Q. Did he say he had been doing that right along? [751]

A. I can't recall that he said he was doing it right along. He was doing it currently.

Q. That had been his practice, had it?

A. Yes, I think that is right.

Q. That would mean to you, wouldn't it, Mr. Hart, he didn't have sufficient funds at the moment to pay his current bills and he had to draw on income from previously written business?

A. I think that was the indication that I had.

Q. How did you expect he would be able to pay the premiums that he collected on business written for you if he didn't have sufficient funds to finance the business?

A. For this reason, Mr. Garrison: When I left Mr. Lotz, or prior to my leaving Mr. Lotz, I impressed upon him the necessity of desisting from this practice and he assured me he would. And when he left me at the airport, he told me he was glad I had come back, and he was sure glad to know why this was unwise.

Q. Did he say what he would use for money?

A. No, but he did talk about commission earnings he had accrued on Mid-States books. He mentioned \$9,000.00 a month.

(Testimony of Mark M. Hart.)

Q. Was Mr. Cass employed by your company at that time? A. No, sir.

Q. When was she first employed by your company? A. He never was employed by us.

Q. Wasn't he employed by American Plan or American Fidelity? [752] A. No, sir.

Q. Never was? A. No, sir.

Q. At any rate, you got that information in the credit report and you knew generally something about Mr. Lotz and his agency plant before he was appointed?

A. Yes, to the limited extent of what was in the credit report.

Mr. Garrison: (Handing document to Mr. Bronson.)

Mr. Bronson: Well, wait a second while we have a chance to go over this.

Mr. Garrison: Certainly.

Mr. Garrison: Q. I show you a letter, Mr. Hart, dated in April, 1951, on the American Plan stationery, and ask you if you recall ever having seen that letter or having known about it.

A. Yes, sir.

Q. And that is the letter that was written by Mr. Sudekum, is it not? A. That is right.

Q. Who is he?

A. He was executive vice president of our company at the time.

Q. Written to Mr. Stanley B. Markel, vice president of American Fidelity and Casualty Company?

A. That is correct.

(Testimony of Mark M. Hart.)

Mr. Garrison: I ask that this be marked in evidence.

The Court: Let it be admitted and marked.

(Whereupon letter dated April 9, 1951, from Sudekum to Markel, was admitted into evidence as Plaintiff's Exhibit No. 34.)

Mr. Garrison: If I may, I would like to read this letter. It is on the stationery of the American Plan Corporation, dated April 9, 1951:

"Mr. Stanley B. Markel, Vice President
American Fidelity and Casualty Company
Insurance Building
Richmond, Virginia

Re: Joseph Lotz

Code No. 6-117-04178

Dear Stanley:

"The above account is an extremely active account in the State of California, giving us a considerable amount of premium income. The account has been with Mid-States for a great many years and has established an enviable record.

"During his visit to California recently, Mark Hart was requested to grant the account a seventy-five day premium payment addendum. We can only highly recommend you to grant this request, and we would [754] appreciate your early permission to issue the necessary addendum.

Best personal regards,

Sudekum"

(Testimony of Mark M. Hart.)

Mr. Garrison: Q. The addendum refers to a modification of your agency contract to determine the credit period, doesn't it? A. Yes.

Q. Does that refresh your recollection as to whether or not you were out here prior to May, and in the month of April or before?

A. I am completely mystified. I don't think I met Mr. Lotz before May, 1951.

Q. Does that refresh your recollection as to whether or not your company knew Mr. Lotz had established an enviable record with Mid-States?

A. That it does, yes, sir.

Q. And that is a fact, is it not, that he had established an enviable record with Mid-States?

A. That is what Mr. Sudekum says.

Q. He says you found that out.

Mr. Bronson: All it is is the statement of the writer of the letter, and we object to going any further than that.

Mr. Garrison: Q. As I understand it, you had, in July, 1951, a delinquent account with Mr. Lotz of some \$6600.00, [755] involving a reinsurance transaction? A. Yes.

Q. And that amount had been delinquent for several months? A. Yes, sir.

Q. Then I believe in the same month, earlier possibly, you had a check in the sum of \$50,000.00 returned that had been given you by Mr. Lotz, by the bank and not paid. A. That is correct.

Q. And that check wasn't paid because there

(Testimony of Mark M. Hart.)

weren't sufficient cash in the account when it was presented, to meet it?

A. Not in that sense, no, sir.

Q. You regarded that check, did you not, as a check returned for not sufficient funds?

A. No, we didn't.

Q. At any rate, it was a check that didn't get paid? A. That is correct.

Q. And that caused you some concern and alarm, didn't it, in August?

A. Sure. Any check in that amount, of course.

Q. Certainly. And that is the first time Mr. Lotz had ever given you a check that hadn't been paid? A. That is correct.

Q. I show you Plaintiff's Exhibit 28, which is the letter to Mr. Lotz, and ask you if you are familiar with that?

A. I heard tell of it, yes. [756]

Q. I didn't ask you that. I asked if you were familiar with it?

A. I am familiar with it.

Q. This letter was written by the chief accountant there, Mr. Taormina, is it not?

A. That is correct.

Q. It was to Mr. Lotz, dated August 14th, 1951: "Enclosed please find your check No. 1670 in the amount of \$50,301.88, returned to us due to insufficient funds."

I take it you place a different interpretation on the check than does Mr. Taormina.

A. I certainly do. He erred.

(Testimony of Mark M. Hart.)

Q. But it did give you some concern and alarm, at that time? A. Oh, absolutely.

Q. And that was in the fore part of August?

A. That was in July.

Q. The letter that Mr. Taormina writes Mr. Lotz is dated August 14, 1951.

A. Well, I think by that time a new check had come in and at this late date he was returning the old one.

Q. Did you have some telephone or teletype conversation with Mr. Smead at about this time in connection with this check and his overdue account?

A. This \$50,000.00 check? [757]

Q. And the overdue account?

A. Yes, I think we did.

Q. And that conversation occurred just before they came to New York to your August 13th meeting?

A. The conversation about the \$50,000.00 check occurred the latter part of July, or the moment we were notified by our bank.

Q. And you had a conversation with them just before they came to New York, on the telephone, regarding their arrival? A. That is correct.

Q. Wasn't that telephone conversation one in which Mr. Smead reported to you the real true facts regarding the Lotz account and told you they were in a very bad situation, and then you said, "Come back to New York immediately".

A. Mr. Smead reported to me that they weren't

(Testimony of Mark M. Hart.)

in a position to make this \$6600.00 payment and I said, "Come to New York immediately," yes.

Q. Didn't he make any reference at that time to the August 15th account of \$66,000.00 that was going to be due in ten days?

A. I don't remember him making reference to the item.

Q. Didn't he say they wouldn't have the money to pay the account?

A. That was obvious. They didn't have the \$6600.00.

Q. So the affairs of the Lotz agency were discussed in that telephone conversation? [758]

A. To the extent he was unable to pay the \$6600.00.

Q. And to the further extent you asked him about the August 15th payment of \$66,000?

A. I believe I said to him, "How are you going to make the \$66,000.00 payment", that's right.

Q. That's the point. So they did come to New York, and you were concerned about their position at that time? A. I was, yes, sir.

Q. Isn't it true you cancelled Mr. Lotz' account at that meeting in New York?

A. That is not true.

Q. You say Mr. Lotz told you immediately upon his arrival that he had this contract, or was negotiating one with Mid-States?

A. He said something to that effect.

Q. And that it was a better one and more favorable than he had with you? A. Yes.

(Testimony of Mark M. Hart.)

Q. And it was for that reason that you decided that you couldn't grant him any extension and wouldn't do any more business with him?

A. That was the predominant reason, yes.

Q. And you told him that on that occasion, didn't you?

A. I said, "We can't meet this deal."

Q. And that you would not be willing to write any more business? [759]

A. No, I did not say that.

Q. I call your attention to Plaintiff's Exhibit 30, which is a letter that is signed by Joe Lotz on the American Fidelity and Casualty Company stationery and addressed to the American Plan. You are familiar with that letter? A. Yes.

Q. You dictated it, didn't you? A. Yes.

Q. And you dictated it for Mr. Lotz' signature?

A. That is correct.

Q. Well, what did you mean in this letter when you said, starting out,

"American Plan Corporation, Gentlemen: Pursuant to my discussion with your Mr. Hart in New York on August 13, 1951, and particularly in view of your inability to comply with my request for a prepaid commission, I hereby terminate my agency agreement"?

A. I meant that pursuant to the discussion where he asked us for a fifteen per cent prepaid deal and I said we are unable to give it to him.

Q. You didn't actually think that the proposal

(Testimony of Mark M. Hart.)

that he had with Mid-States Company was more attractive to him than yours, did you?

A. It certainly was.

Q. Yours was a guaranteed twenty per cent commission, wasn't it, [760] regardless of losses?

A. Yes, sir.

Q. And there is a fifteen per cent advance commission subject to losses? A. Yes, sir.

Q. So that if losses were high in the instance of Mid-States Insurance Company, conceivably he wouldn't have any commission.

A. He would have his fifteen per cent on a written premium basis, giving him immediate cash.

Q. But it would be charged against him in the future if his losses were high?

A. But not permitted to be recovered, in my understanding of a prepaid commission basis.

Q. Well, you mean that they guaranteed him a prepaid commission?

A. There were two types of prepaid commission contracts.

Q. I am talking about the one involving Mr. Lotz and Mid-States.

A. At that point the deal hadn't been made, and I hadn't seen the contract, didn't know what it was all about. He talked about a fifteen per cent prepaid deal to give him cash in hand.

Q. So there wasn't then, any actual reason for you to discontinue doing business with Mr. Lotz insofar as the other arrangement was concerned because it hadn't been made.

(Testimony of Mark M. Hart.)

Mr. Bronson: That is an argument with the witness, and we object to the question. [761]

The Court: It is in the nature of argument.

Mr. Garrison: This is cross examination, and I am asking him if it isn't a fact that there wasn't any real reason for him to have cancelled his contract with Mr. Lotz because the Mid-States contract hadn't even been made.

The Court: He may answer.

A. It is true that the Mid-States contract hadn't been made, but Mr. Lotz had informed us that in discussions with some official of Mid-States—I believe it was Mr. Hatfield—he was told that he could have this deal if he went to Chicago and made it. Now, to all intents and purposes it was a deal in the works, and I said to him we couldn't give him the same deal.

Mr. Garrison: Q. And proceeded to prepare not to do any more business with him at all.

Mr. Bronson: That has been asked.

The Witness: No, that is not true.

Mr. Garrison: If the Court please, this is cross examination. I would like to be able to conduct it without asides from Mr. Bronson unless he has some specific objection to make.

Mr. Bronson: I object on the ground the question has been asked and answered, but it may be answered again.

The Court: You may answer.

A. On August 13th, Mr. Garrison, there was no

(Testimony of Mark M. Hart.)

termination or [762] thought of termination of the contract.

Mr. Garrison: Q. And it wasn't even suggested at that meeting, then, that you would terminate the contract? A. No, sir.

Q. Now, do I understand your testimony, Mr. Hart, as of yesterday to be that when Mr. Smead was in your office on August 13th he told you that the amount due the Lotz agency from sub-agents on account of premiums for business written in your company was \$140,000.00?

A. That is correct.

Q. And you emphatically deny, I take it, that Mr. Lotz, or Mr. Smead, told you the amount was \$75,000.00 approximately?

A. At that meeting, yes, I deny that.

Q. Well, in any meeting in New York?

A. Any meeting in New York.

Q. You have learned subsequently, have you not, that the true fact is that the premiums due Lotz for your company's writings were, in fact, \$75,000.00, haven't you?

A. As of August 13th?

Q. Yes.

A. No, I have not learned that.

Q. I am talking about round figures, now. I am not talking about seventy-five or eighty, I am talking about that area. You have subsequently learned it wasn't anywhere near \$140,000.00, haven't you?

A. No, I haven't.

(Testimony of Mark M. Hart.)

Q. Did you honestly think at that time it was \$140,000.00?

A. Yes. And I had very good reason to base it on, too.

Q. There is no question about that in your mind?

A. No.

Q. As I understand it, then, Mr. Lotz also told you that they were going to try to borrow \$100,000.00 from some bank?

A. He didn't mention a bank. He said that they were going to get a loan of \$100,000.00, that's correct.

Q. And that is also at the New York meeting?

A. Yes, sir.

Q. So that you knew, then, as of that date that they were in very bad financial condition?

A. I knew that they were strained from a cash standpoint, yes, sir.

Q. You knew that they owed you \$240,000.00?

A. Yes, sir.

Q. And on your own figures, they had only coming on your account one hundred forty?

A. That is correct.

Q. You knew that they owed Mid-States thirty, didn't you?

A. At that time I don't think I did.

Q. Didn't you ask him whether he owed other companies?

A. Only interested in our own balance.

Q. Well, you knew you were going to get paid, if

(Testimony of Mark M. Hart.)

at all, out [764] of income from his insurance agency, didn't you? A. Yes, sir.

Q. Didn't you consider what his obligations might be to others at that point?

A. No. We knew at that time that we were the major writer and must be the major creditor of his.

Q. But to what extent you were the major creditor you didn't take time to inquire?

A. No, sir.

Q. And you knew that he was in such shape that he had to go out and borrow \$100,000.00?

A. He told me that, yes.

Q. Well, now, that caused you very grave concern, didn't it?

A. At the inception of the meeting, yes, but not at the conclusion of the meeting.

Q. Well, he didn't have any more money at the conclusion of the meeting than when you started, did he?

A. No, he didn't it's true; but a calculation as to how he could repay eased any of our fears about it.

Q. Did the fact that you were going to get another company to take their business and pay you the premiums have anything to do with your enlightened and benefitted state of mind?

A. No. There was no discussion about paying premiums, other companies.

Q. Now, you had been demanding financial statements from [765] Mr. Lotz ever since April hadn't you? A. At least April.

(Testimony of Mark M. Hart.)

Q. Every month? June, July—every month?

A. I don't know whether our treasury asked for it every month, but several times.

Q. Never got it? A. No, sir.

Q. I take it Mr. Smead returned to Oakland for the express purpose of proceeding with collections.

A. That is correct. He told us there was \$40,000 of the May balance of \$66,000.00—

Q. I didn't ask you that. I just asked you if *you* returned for the express purpose of proceeding with collections? A. Yes.

Q. Because you had the August 15th account coming up of \$66,000.00, plus the \$6600.00?

A. That's correct.

Q. Did you know that Mr. Will suggested in a teletype on August 16th that they arrange to have the payments to your account made automatically by the bank?

A. I believe I know something about that.

Q. Well, that would have meant that there wouldn't be any credit balance at all for Mr. Lotz, wouldn't it? A. No, that is not true.

Q. That he pay you immediately upon collecting premiums? [766]

A. No, that's not correct.

Q. Well, if the minute any funds came in to his trustee account from collections they were to be automatically transferred to your account, that would be in advance of the due date of your monthly statement?

A. Oh, I see your point, yes.

(Testimony of Mark M. Hart.)

Q. Yes, certainly. So that in effect that was an abrogation of your contract—of his contract with you, wasn't it?

A. I don't know the legal significance of abrogation.

Q. I am not asking you about legal significance.

A. Well, you're asking me about——

Q. (Interposing) Under his contract the due date would fall due the 15th of the following month, wouldn't it? A. That is right.

Q. Seventy-five days? A. Yes.

Q. And under the proposal that deposits be made automatically they would be paid at some time prior to the normal seventy-five day's due date?

A. That requires an explanation, Mr. Garrison.

Q. All right. A. May I?

Q. Certainly.

A. The trustee account of the Lotz agency was at the Central Bank, and some time in the early part of August—I believe [767] August 1st or 2nd—pursuant to Mr. Sudekum's recommendation, resulting from his visit here in July, Mr. Will asked Mr. Lotz in future that deposit checks be deposited directly to the AFC account in the Central Bank rather than mail them to New York.

Q. Automatically?

A. I am not sure whether he said in that letter automatically. I'm talking about the letter now, Mr. Garrison.

Q. Well, I am talking about the teletype.

(Testimony of Mark M. Hart.)

A. Well, I was explaining and I would like to take it chronologically.

Now, since both the trustee account and the AFC account were in the Central Bank, we asked, I believe, according to that teletype, that the bank make automatic transfer of funds from the trustee account to the AFC account.

Q. All right.

A. But with regard to the abrogation of the contract, that would only ensue if he collected the money more rapidly than seventy-five days.

Q. That's right. If he did collect more rapidly than seventy-five days it would mean a change in his contract relation with you.

A. To that extent it would, certainly.

Q. Certainly. To that extent. So that wasn't that an evidence that you treated his agency contract as having been terminated [768] August 13th in New York?

A. No.

Q. It wasn't?

A. No.

Q. All right. As I understand it, your arrangement with Mr. Lotz was that he was to pay you in full the \$240,000.00 balance due by the 15th of the following month, some three weeks later.

A. That was the language of the agreement but, as I said yesterday, it was psychological.

Q. Well, that was certainly a clear abrogation of the contract, wasn't it?

A. That agreement was made on August the 22nd after the contract was terminated.

(Testimony of Mark M. Hart.)

Q. And that was a clear abrogation of the contract?

A. Can you abrogate a terminated contract?

Mr. Bronson: Excuse me——

Mr. Garrison: Q. There is no question but as of that time the contract was definitely terminated?

Mr. Bronson: Excuse me. I object to the attempt to use the word "abrogation" with this man. He is a layman, doesn't know about the law. The facts are the things, not a conclusion to be drawn. We object on that ground.

Mr. Garrison: Q. Now, Mr. Hart, you came up to Oakland with Mr. Feller, you said, arriving here August 20th? [769] A. Yes, sir.

Q. I take it Mr. Smead's efforts at collection had not been very successful up to this point?

A. That's correct.

Q. In fact, he had only collected \$8,000.00?

A. I believe he only deposited \$8,000.00 for us.

Q. And you were pursuing him on the teletype the very day following his leaving your office in New York on the subject?

A. I am not sure if it was the next day.

Q. But it was before your arrival, you were following up on collections with Smead?

A. I also don't know whether it was me, personally. I believe I was away at the time.

Q. Well, if it were done, it was done under your stewardship? A. Certainly.

Q. It would be the same thing.

A. Certainly.

(Testimony of Mark M. Hart.)

Q. You brought Mr. Feller along, I think you said, as an incidental aspect of this matter?

A. Well, incidental to the extent that we both had something to do in Los Angeles. I asked him to come along with me.

Q. So that this wasn't your primary purpose, the Lotz situation?

A. No, I wouldn't say that.

Q. Well, you are not sure whether it was or not? [770]

A. I mean, I think the two purposes were equally important.

Q. Well, what was your other business interest?

A. Is that——?

Q. If you don't want to say, just say you don't care to say.

A. I don't mind telling you.

Mr. Bronson: You mean the business in Los Angeles?

Mr. Garrison: Yes.

Mr. Bronson: I think that is irrelevant.

Mr. Garrison: I think it is, too. I think it is objectionable.

Mr. Garrison: Q. The fact is, however, that you charged Mr. Lotz' account \$5,000.00 for your expenses and legal fees on this trip to Oakland for two days, didn't you?

A. I am not sure of that figure, but it was three days.

Q. Well, three days. A. Yes.

(Testimony of Mark M. Hart.)

Q. Let's not quibble over a day, an extra day or three days. You did charge him \$5,000.00?

A. I am not sure of that figure. I have nothing before me.

Q. And when you got out here you found the \$66,000.00 couldn't be collected at that moment, hadn't been collected?

A. Hadn't been collected, yes, sir.

Q. And Mr. Smead assured you in teletypes and when you arrived that he had done everything he could.

A. Said he had been working on it. [771]

Q. Working hard. One of those collections was with another Smead down in Santa Monica and he had been after him?

A. That was a rather substantial one, yes, sir.

Q. And I assume that that disclosure and that fact augmented or heightened your concern over this situation at that time?

A. It was a matter of concern, yes, sir.

Q. And I say it heightened and augmented your concern over even what it had been in New York?

A. In New York I had no concern.

Q. You said you were concerned when the check bounced.

A. Yes, but that was cleared and it didn't bounce for insufficient funds.

Q. They told you in New York that they couldn't make the August 15th payment of \$66,000.00? You knew that?

A. At that moment, yes.

Q. So that why your concern be so much greater

(Testimony of Mark M. Hart.)

in Los Angeles, or in Oakland the following week, when the same facts were known to you then?

A. My concern only became real, Mr. Garrison, after Mr. Smead returned to Oakland, when he failed to collect the \$40,000.00 outstanding of the \$66,000.00 May balance.

Q. All right. So that we are in agreement on this much, that at least when you were in Oakland your concern was very great.

A. I was concerned while I was in Oakland.

Q. And didn't you take steps to learn what the condition of [772] the Lotz agency was in the light of your concern?

A. Take steps to what degree, Mr. Garrison?

Q. To any degree? To learn the financial condition of Mr. Lotz' agency. A. Yes.

Q. You are an accountant? A. Yes.

Q. You know what accounts payable and accounts receivable are? A. Very well.

Q. Didn't you take steps to find out exactly who he owed and how much he owed and what he had coming? A. I think we did.

Q. How did you go about doing that?

A. Just a verbal conversation, oral conversation.

Q. Didn't you look at the books?

A. Never saw his books.

Q. Didn't you have anybody look at the books?

A. No, sir.

Q. Didn't you ask him to get someone to give you some figures from the books? A. Yes.

Q. Who was that?

(Testimony of Mark M. Hart.)

A. I asked Mr. Smead to have his girls give me a breakdown by sub-agents of the amounts due by sub-agents on our business. [773]

Q. Did they do that?

A. Oh, time would not permit them doing it during my visit.

Q. You didn't get those figures?

A. No, sir.

Q. You are sure of this?

A. I am sure I didn't get it.

Q. And that is all you asked for?

A. I believe I asked him other questions related to the general subject.

Q. I know, but didn't you ask him to get you any other figures from the books? A. No.

Q. You just wanted to know, I take it, how much money Lotz had coming on business written in the American Fidelity and Casualty?

A. That was the crux of it.

Q. And you didn't learn what that was?

A. I was told orally it was \$140,000.00.

Q. And you believed that?

A. Oh, yes, I had every reason to believe it.

Q. And you didn't learn any different figure at that time?

A. I believe Mr. Smead at that time said \$75,000.00. I told him that was ridiculous and that he had said one hundred forty in Oakland, and he said, "Yes, it is 140,000."

Q. You weren't concerned about how much he owed other [774] companies?

(Testimony of Mark M. Hart.)

A. Frankly, no.

Q. "Frankly, no." I will show you a copy of a two-page statement on the stationery of American Fidelity and Casualty Company, and it has columnized the names of people and amounts of money set opposite each name, and I will ask you if you have ever seen that before?

A. This is not the stationery of American Fidelity and Casualty Company.

Q. I didn't ask you that question. I simply asked you if you had ever seen that paper before?

A. I believe I saw this statement in a review of the papers you submitted under the Court order.

Q. Is that the first time you had ever seen it?

A. I believe it was.

Mr. Bronson: Counsel has handed me a three-page document, and I suggest we have time to read it, if the Court please.

Mr. Garrison: Let me interrupt. I will come back to this later and you can read it during the recess.

Mr. Bronson: Thank you very much.

Mr. Garrison: Q. I am going to digress now from this question of, the \$140,000 receivables that you say were due, and that you were certain was the amount, and was reported to you in Oakland, and I am going on to another subject and come back to it.

I believe you said you did receive information when you were here in Oakland about the proposal to take over some Public Service business.

(Testimony of Mark M. Hart.)

A. By Mid-States, yes.

Q. And that was discussed a number of times while you were out here?

A. I know it was discussed while I was here. I don't know if it was a number of times.

Q. And as a matter of fact the contract or commission arrangement made with the Russell and Bond Company was made on the very night you left, August 20th, wasn't it—August 22nd, wasn't it?

A. That might be. I left on the morning of the 22nd.

Q. Well, on the night of the 21st. The night before you left you closed the deal with Public Service Company to take over that business?

A. I am not certain.

Q. Including the commission payment with Russell and Bond, the Public Service managers?

A. I am not clear on that fact, Mr. Garrison.

Q. Regardless of the clarity of your recollection, you do know that you were present when they had the document in their hands and discussed it and showed it to you, you had closed the deal with Russell and Bond. [776]

A. No, sir.

Q. Do you deny you ever saw the contract?

A. I am certain I never saw it.

Q. But you did know that they did close it that night?

A. No, I don't know that they closed it that night.

Q. You just knew they were making one?

(Testimony of Mark M. Hart.)

A. Well, as a matter of fact, on the 20th when they discussed it with me I was under the impression it was already closed.

Q. And they told you they were going to pay a commission to Russell and Bond for the business, didn't they, of that 25 per cent?

A. Yes, they did.

Q. And did they also tell you they were going to have Russell and Bond do the physical work of rewriting the policies and pay them ten per cent for that?

A. No, I learned that later. They didn't tell me that.

Q. They didn't tell you that? Did they tell you that the gross premium on that business was 150,000?

A. They said approximately 150.

Q. And that if they had to pay a 25 per cent commission for the business, that would involve a payment to the manager of Public Service of 25 per cent of 150,000?

A. In effect, yes.

Q. That would be what? \$37,500? [777]

A. Yes.

Q. So then you left on August 22nd, and up to this time the best Smead had been able to do by way of collections was \$8,000?

A. Not as of August 22nd, no, sir. Mr. Lotz had \$30,000 in the trustee account.

Q. And you got 24 of it? A. Yes, sir.

Q. And immediately thereafter the frequency and the size of the collections and the payments to you increased tremendously, didn't they?

(Testimony of Mark M. Hart.)

Mr. Bronson: Well, that's a relative term. We have the records, I think, of all of them.

Mr. Garrison: Well, we will get to the records. He knows what "tremendously" means.

The Court: State whether or not they increased.

Mr. Garrison: Q. They increased very substantially?

Mr. Bronson: Same objection. Just going in the back door.

A. Some of the payments were very small. Others were an increase over what they had been.

Q. And the frequency increased very substantially?

Mr. Bronson: Same objection to the argument about "very substantially".

Mr. Garrison: Very well, I will withdraw the question. [778]

Q. You followed the subject of collections very closely, didn't you? A. Very closely.

Q. And you knew and either received or asked for information every day about when the deposits in your account were going to be made?

A. At least once a day.

Q. So that the first deposit that was made to your account after you left was made on August 25th in the sum of \$4,304, was it not? If you can't recollect—— A. Yes, I think——

Q. ——your counsel has the transcript of the teletypes and they are all disclosed.

A. I do recall that.

Q. You do recall that? A. Yes, sir.

(Testimony of Mark M. Hart.)

Q. And then on the 29th you had a discussion about the \$30,000 deposit?

A. I think we had a phone conversation on the 29th.

Q. And you also had a teletype message back and forth about, "Where is the \$30,000"?

A. Yes.

Q. And that was deposited to your account?

A. Yes.

Q. And on the same teletype on the 30th they reported a [779] \$1,450 payment to you?

A. I recall that.

Q. You recall that? By the way, did you know that during this same period of time that these deposits were being made in your trustee account that they were also mailing to your office certain checks, physically, and not depositing them, making payments directly to you?

A. Premium checks?

Q. Yes, sir.

A. No, sir, I don't know that.

Q. You have learned that, haven't you, that your Company received in direct payments, not deposited to the trustee account, some \$34,000?

A. Subsequent to August 15th?

Q. In September.

A. No, I haven't learned that.

Q. Didn't you ever look at Mr. Horton's audit report?

A. I believe I have looked at it, but I don't recall that figure.

(Testimony of Mark M. Hart.)

Q. Well, I will call your attention to page 13, Mr. Hart, and ask you if you are not familiar with the fact that under payments made to American Fidelity and Casualty, there is shown a payment direct of \$34,000. A. Yes, there is.

Q. Does that refresh your recollection?

A. Yes, it does.

Q. That there were payments made to your company that didn't [780] go through the trustee account? A. Yes, it does.

Q. And are you also familiar with the fact that as of those payments \$10,100 were payments that had been collected by Lotz on business written in Mid-States Insurance Company?

A. No, I am not certain of that at the moment.

Q. You saw it in the report?

A. Just this minute? No. I looked at the \$34,000 figure.

Q. You didn't see that?

A. No. I would like to see it again.

Mr. Bronson: There is a difference between what the report shows and——

Mr. Garrison: (Interposing) He's an accountant, he can dispute it if he wants to.

Mr. Bronson: Please——

Mr. Garrison: Q. Over at the left——

Mr. Bronson: Mr. Garrison, I hate to interrupt you. Will the witness be careful, when he is asking the witness whether he knew this or that, whether he knew it after he read this report made up a year or two later, or whenever it was, or as of the time

(Testimony of Mark M. Hart.)

the collections were being made. We might have a record here that just isn't illuminating at all.

Mr. Garrison: I am talking about an Exhibit in this [781] case. If it isn't illuminating, I think it would have been mentioned at the time we offered it in evidence.

Mr. Bronson: I am going to say this: We will object as incompetent, irrelevant and immaterial to anything that the witness learned from examination of the report of Lester, Herrick & Herrick long after this matter was concluded, long after the year involved. He can look at that and learn a lot of things, but what that is isn't going to help us here.

Mr. Garrison: If he did not learn it, all he has to do is say so.

Mr. Bronson: Yes.

Mr. Garrison: Q. Is it a fact that you did know of that \$34,000 that was paid directly to your Company in the month of September, that \$10,100 of it involved premiums of Mid-States business?

A. I knew it only to the extent of looking at the report of your auditor.

Q. You were following these collections very closely, day to day? A. Very closely.

Q. And you knew these direct payments were coming in?

A. I am not certain that I did know that.

Q. Didn't you get a statement of the account?

A. My treasurer would advise me almost daily, or every other [782] day, as to how much had been

(Testimony of Mark M. Hart.)

collected. But I don't believe that I ever asked him what was received in deposit slips and what was received in checks. That wasn't important.

Q. Well, here's a teletype on the 29th of August, addressed to you personally, and it says, "Have you received deposit slip covering commission check in the amount of \$4,304 in the Central Bank?" And you say, "Yes, we have." That's to you, not your office.

A. Excuse me, Mr. Garrison, did you say commission check? Oh, deposit slip.

Q. Deposit slip.

A. Yes, and I said, "Yes." That's right.

Q. And then you replied, "Ralph Smead: What about \$30,000 deposited 8/29?" That's your own handiwork.

A. Yes, sir.

Q. And then he says, "I will have that cleared for deposit in your account this afternoon or tomorrow," and then you go on to refer to another deposit of fourteen fifty and also thirty thousand?

A. Yes, sir.

Q. But you didn't make any inquiry in respect to these receipts direct as to whose money it was?

A. Well, it was immaterial as to whether the money was deposited—

Q. (Interposing) Oh, that isn't what I asked. I asked if [783] you made any inquiry?

A. No, I didn't.

Q. All right, that's the answer.

You said yesterday that, in explanation of this inquiry as to the address of the Public Service In-

(Testimony of Mark M. Hart.)

insurance Company, that you were getting suspicious about something. Will you tell us what that testimony was?

A. Well, I was wondering whether or not the deal had actually been made to rewrite \$150,000.

Q. Deal with whom?

A. That Mr. Lotz' office had negotiated between Mid-States and Public Service, and I had the thought that I would check with them to see if they had this deal, but as I said, I never did.

Q. Well, how did you check with Public Service as to what arrangement Lotz had with Mid-States?

A. I would simply call Public Service and ask them if they were cancelling and rewriting business with Mid-States as I had been told.

Q. But you knew the cancellation would be handled through Lotz' office?

A. But Public Service would first have had to indicate which ones they wanted to cancel so that if there was a deal Public Service would know about it.

Q. Public Service would know what Lotz' arrangement with [784] Mid-States was?

A. No, I think you are misinterpreting me. Before Mid-States could rewrite the business, Public Service would have to cancel.

Q. Certainly.

A. My concern was whether or not the deal had been stopped in the middle, or whether or not Public Service was going to continue to write.

Q. Didn't it occur to you to call Mr. Hatfield,

(Testimony of Mark M. Hart.)

your friend, and ask him whether or not he had a deal to take the Public Service business?

Mr. Bronson: I object to the form of that question. Maybe you should ask if he was a friend. That is in doubt at the moment.

Mr. Garrison: I think that is frivolous, if the Court please. Of course he knows who I mean, and he said in his telephone conversation he was a friend. At any rate, let's forget about it.

Q. Whether he was a friend or not, did it occur to you to call Mr. Hatfield and ask him, the party involved, if they had a contract to take over that business?

A. No, but I'm not talking about whether they had a contract or not.

Q. Or arrangement, or an understanding?

A. I am not talking about that, either. [785]

Q. Well, let's find out what we are talking about. You said you wanted to get the Public Service Company's address?

A. Yes, that's right.

Q. To find out if Mr. Lotz had an arrangement with Mid-States Company to take the Public Service business, is that what you said?

A. I am not sure if I used those words.

Q. Well, put it in your own words.

A. All right. Primarily what I was concerned about was Public Service didn't start to cancel and rewrite in Mid-States, and yet for some reason or other stopped before the \$150,000 was written.

Q. Why did they stop?

(Testimony of Mark M. Hart.)

A. Why, there could be many reasons why they would stop.

Q. They would stop principally because Mid-States would stop it, didn't they?

A. That would be one reason why they could stop.

Q. Didn't it occur to you that you might check with Mid-States to see if they knew about this?

A. No.

Q. You knew that Mr. Lotz had authority under his contract to take this business and put it in Mid-States Insurance Company without their knowing it?

A. Any general agent has that right.

Q. Right. And you knew that Public Service were in trouble [786] with the Insurance Commissioner and were anxious to get rid of this business because they were short of surplus?

A. I had been told that.

Q. So that there wouldn't be any occasion on their part to stop this rewrite? They were delighted with it, weren't they?

A. There could be occasion for them to stop. They could have made another deal with another company for 30 percent commission in the meantime.

Q. But at any rate, you wanted to get the address of Public Service company to ask them if they knew any reason why——

A. (Interposing) I had that thought in mind.

Q. It didn't ever occur to you to call up Mid-States?

A. I don't believe it did.

(Testimony of Mark M. Hart.)

Q. And you knew that Mr. Lotz was in financial difficulty and you were greatly concerned about it, weren't you, at that very moment, and had been ever since you had been in Oakland on August 20th?

A. I knew that Mr. Lotz was financially strained, yes.

Q. And you were greatly concerned?

A. I was concerned about collection of my premiums.

Q. All right. Now, on September 4th, you got \$6400 from Mr. Lotz, did you not?

A. I don't recall that.

Q. Well, your counsel has this transcript of the teletype. [787] That is on page 8, top of the page. Top of page 8, September 4th. Teletype. I don't want to read all these.

"Ralph Smead to Mark Hart: Deposited \$6,480 account of American Fidelity & Casualty Company this date," do you remember that?

A. I do now that you mention that.

Q. All right. And on September 6th, two days later, they reported that they deposited \$4,157?

A. If that is what it says.

Q. Do you remember it?

A. Oh, I don't remember every figure, no.

Q. On September 13th they advised you that they deposited \$5,119, do you remember that?

A. Not the figure, but if the record says so, that's all right.

Q. And on September 14th they reported that they had deposited \$5,000?

(Testimony of Mark M. Hart.)

Mr. Bronson: What page is that on?

Mr. Garrison: That is proceeding over to page 9.

Mr. Garrison: Q. I would like to call your attention to this particular teletype, Mr. Hart, and ask you if you will read that one?

A. I was trying to figure out who it is addressed to. It is addressed to me, apparently, from Ralph Smead. "Will not make deposit until after three o'clock today. Have approximately \$5,000 regular and will make transfer from [788] other funds."

Q. "And will make transfer from other funds." What did you think he meant by that?

A. Could be anything. Could be the trustee account fund.

Q. Didn't you know what he meant?

A. No.

Q. Didn't you ask him what he meant?

A. No.

Q. Didn't it occur to you that he might be taking somebody else's premiums and putting in your account?

A. No, it didn't. He had enough receivables of ours to collect.

Q. Did it occur to you somewhat strange that this sudden flood of money had started coming in?

A. No. I expected it.

Q. Well, Mr. Smead had great difficulty collecting any more than \$8,000 before you arrived there and before the Public Service deal was made?

A. That is true.

Q. As soon as the Public Service deal was made

(Testimony of Mark M. Hart.)

these very substantial collections started coming into you? A. That is correct.

Q. And on September 17th you received \$8,300?

A. If that's what it says, yes.

Q. And on the 14th you wired Mr. Smead that this is the [789] day before the deadline and \$190,000 has got to be raised, didn't you?

A. That is correct.

Q. And on the 17th you got \$8300, and on the 17th another deposit of \$7800?

A. That is what it says.

Q. And then on Saturday you received a deposit of \$60,000, didn't you? A. Saturday?

Q. Saturday, September 18th?

A. Our offices are not open on Saturday.

Q. All right, they deposited on Saturday out here? A. Yes.

Q. \$60,000? A. I heard we did.

Mr. Bronsen: On Saturday?

Mr. Garrison: The teletype says Saturday.

Mr. Garrison: Q. But it doesn't make any difference whether Saturday or Friday, the fact is you got \$60,000 from Smead at that time, didn't you?

A. That is correct.

Q. And it didn't occur to you at that time that that might have had something to do with the \$150,000 they were going to get from Public Service?

A. No, sir, it didn't. [790]

Q. You thought they had gone out and collected that sum from all the sub-agents they had around?

A. Well, there was one sub-agent in particular

(Testimony of Mark M. Hart.)

I was sure of at the time owed them 50 to \$70,000.

Q. Well, you say you were somewhat suspicious a little bit before this, but still when this \$60,000 check came in your suspicion was no greater than it had been before?

A. Suspicious about what?

Q. About the fact that maybe Lotz didn't have the deal he said he had with Mid-States Insurance Company?

A. That \$60,000 didn't change my thinking.

Q. That didn't increase your suspicion?

Now, calling your attention to the exchange of teletypes that you had on August 30th—Mr. Bronson asked you about them yesterday.

Mr. Bronson: What is the page?

Mr. Garrison: Page 6, at the bottom of the page.

Q. And you say, "How about funds of \$1,450 which you received last Friday? Also, has check of \$30,000 actually been deposited bank A.F.C. account". Did you think that might be collections from anyone of Lotz' agents other than Public Service?

A. Oh, yes. I thought that might be collections in part.

Q. Mr. Smead says, "Answer to both questions, checks are payable to Mid-States Insurance Company awaiting authorization [791] required deposit. We are advised by that company authorization has been forwarded to us. That is the only hold-up, but has been definitely cleared. After your telephone

(Testimony of Mark M. Hart.)

conversation yesterday with Smith, everything is much better."

Now, did you still think that that \$30,000 they were talking about was money other than Public Service money? A. Yes, I did.

Q. What did you think the authorization of Mid-States had to do with it?

A. Well, of course I was anxious to get the Mid-States checks free for Joe Lotz' deduction of commission of 15 percent. That is, the Public Service checks, rather.

Q. They are talking about depositing \$30,000 in your bank account.

A. That's right. But 15 per cent of 150 alone would be 22,500, apart from any collections he made on our business.

Q. Did he get to take that out of the premiums on the very first collection?

A. That's the point. If the premiums were made—if the checks were made payable where he could use them, he could deduct it, yes.

Q. Before commission on collections, even though the collections had not been made?

A. No, sir. To the extent of whatever amount he received, if he were permitted to deduct it, he could deduct 15 percent. [792] Now, the \$30,000 could have several components in it. Partly his commission on Public Service business and partly our collections.

Q. You know, do you not, that the first check

(Testimony of Mark M. Hart.)

What was made by Public Service was made payable to Joe Lotz? A. I heard that, yes, sir.

Q. And then they stopped payment on it?

A. I heard that.

Q. And issued it to Mid-States? A. Yes.

Q. Your wire continues and says, "Understood Public Service checks were to be made payable to Lotz." That is your teletype.

A. That's right. He told me that.

Q. "Has this procedure been changed?"

A. Right.

Q. And they say, "First check payable to Mid-States." They mean first check payable to Lotz I take it. That's a typographical error. "However, this has been changed and if we do not receive authorization right away from them we can have reissued."

What difference did it make how the checks were made payable insofar as the commission they were going to get is concerned? They could have deposited them whether they were made payable to Mid-States or to Lotz, couldn't they? Why were you interested in how these checks were to be made [793] payable?

A. For this reason: Mr. Garrison, if they were made payable to Mid-States and he had to pay the entire gross, that is, 100 percent of the rewritten premium to Mid-States, they could very well apply his commission to their balances. I wanted that commission to be applied to our balances.

Q. Well, if they were deposited in his trustee account he could have disbursed them in any way

(Testimony of Mark M. Hart.)

he wanted to, couldn't he?

Mr. Bronson: It is getting to be argumentative, I think.

Mr. Garrison: I think we know what we are talking about. This is cross-examination and on a very critical point.

The Court: I realize that it is cross-examination, but you can't be argumentative.

Mr. Garrison: I don't want it to be, but I do want an answer.

Q. The fact of the matter is that the way the checks had been made, whether Mid-States had authorized endorsement of the checks or not, had nothing whatever to do with Mr. Lotz paying you his commission out of his trustee account if he had gotten the money in?

Mr. Bronson: Is that a question?

The Witness: May I have that question again? I don't quite follow it.

The Court: I suggest you reframe your questions. We [794] will take a short recess.

(Short recess.)

Mr. Garrison: Do we have a question pending, or do we have an answer?

The Court: It was suggested you reframe your question.

Mr. Garrison: I think that's right. Well, let's drop the question and come back to it later. I think that's a good idea.

Q. I would like now, Mr. Hart, to return to this important subject of the accounts receivable in Lotz'

(Testimony of Mark M. Hart.)

office on account of the American Fidelity writings in August of 1951.

You have expressed yourself as knowing that they were 140,000, and Mr. Smead told you they were 75, and I asked you if you knew that the ultimate fact turned out that they were actually 75, and you said you didn't know that.

Before I pursue that subject let me ask you that the importance of this subject—see if I am correct—the importance of this subject is the fact that you used the figure 140,000 in demonstrating the way in which Mr. Lotz was able, or you thought he would be able from his collections to pay your account of \$240,000, is that true?

A. That was a component part of it, yes.

Q. One of the elements. And the other was the credit you were going to give him on his earned commissions, and [795] then he was going to borrow some money.

A. And several other elements.

Q. Now, I want to call your attention to this letter dated August 29th from you to Mr. H. M. Will, as an interoffice communication consisting of three pages, and ask you if you have seen that before and if in fact that is not a letter that you wrote to Mr. Will?

A. This was an interoffice communication I wrote to Mr. Will.

Q. And Mr. Will was treasurer of your company?

A. Yes, sir.

Mr. Garrison: I ask that this be received in evidence as Plaintiff's Exhibit next in order.

(Testimony of Mark M. Hart.)

The Court: It may be admitted and marked.

(The letter above referred to was admitted in to evidence and marked Plaintiff's Exhibit 35.)

Mr. Garrison: This interoffice communication was written shortly after you returned from Oakland in August, 1951, was it not? A. Yes, sir.

Q. August 29th? A. Yes.

Q. Within a week. And this entire three pages deals with your trip to Oakland and the Lotz account, does it not? A. Yes, sir. [796]

Q. I want to read you one paragraph here, Mr. Hart, and it is a paragraph fourth from the bottom appearing on the second page.

Mr. Garrison: And incidentally, your Honor, this is a letter which was furnished us by counsel for defendants under our order to produce.

Q. The fourth paragraph from the bottom, page 2:

"At the present writing there are premiums outstanding of \$70,000 due Joe Lotz from sub-agents and applicable to policies to the American Fidelity & Casualty Company. I have instructed Smead to either effect collections within a reasonable time or, failing to do so, cancel the individual policies for non-payment of premiums. In any event, we are assured of an additional \$70,000 credit either by cancellation or collection."

Did you write that? A. I did, yes, sir.

Q. And was that true when you wrote it?

A. As of August 29th, yes, sir.

(Testimony of Mark M. Hart.)

Q. Had there been collected between August 20 and August 29th a hundred and forty—I should say \$70,000 in premiums and paid to your account?

A. There had been collected or cancelled approximately that [797] amount. \$30,000 was deposited the day before, purportedly.

Q. Don't you think it is a rather strange coincidence that when Mr. Smead was in New York he told you the accounts receivable were \$75,000, he told you when you were in Oakland they were \$75,000, the auditor finds as a matter of fact that they were \$75,000, and that you reported to Mr. Will a week later that they were \$70,000? Don't you think that is a strange coincidence?

A. No, I don't. On August 13th it couldn't have been less than \$140,000.

Q. Now, I show you a statement that I asked you about earlier and you said you saw it in the material we furnished you under your demand.

A. Yes, sir.

Q. Is it not a fact that this is a statement showing the accounts of sub-agents that Mr. Lotz had and the balances due from them, and the balance shown on this tabulation is \$71,642.

A. That is what it says.

Q. And you say that that is not the fact existing at that time? A. I say it couldn't be.

Q. And you didn't receive this document?

A. To the best of my recollection, no.

Q. Well, you certainly would have recollected if you had [798] received it, wouldn't you?

(Testimony of Mark M. Hart.)

A. Not necessarily. It is three years ago.

Q. The subject was of very great importance, and you were in Oakland for the very purpose of working on it.

A. Well, I have seen hundreds of documents relating to this case, Mr. Garrison, and to the best of my recollection I have not seen that one.

Q. Well, we will pursue that a little more later on. But now let's get back to the subject of this interest that you had in how the Mid-States checks were to be endorsed and in which account they were to be deposited.

As I understand it, your sole interest was in seeing that Mr. Lotz paid you his commission because of his writing that business in Mid-States Insurance Company?

A. And on any other business in Mid-States, yes.

Q. Well, in these teletypes we are talking about Public Service, aren't we?

A. I believe so, yes, sir.

Q. Yes. Well, now, let's just do a little arithmetic, Mr. Hart. You knew that Mr. Lotz had arranged to take that business from Public Service to the extent of about 150,000 gross premium, didn't you?

A. That is correct.

Q. And you knew that on August the 22nd when you were in Oakland? [799]

A. Yes, sir.

Q. And you knew he had to pay Russell and Bond, Public Service managers, 25 percent commission to get the business?

A. I heard that.

(Testimony of Mark M. Hart.)

Q. You testified before recess you knew it. And that was \$37,500? A. Yes.

Q. And you knew under Mr. Lotz' contract with Mid-States he was only permitted to retain as advance commission 15 percent of premiums written for them, didn't you? A. That is correct.

Q. So that the only way he could have taken the Public Service business and handled it according to his contract would have been to have advanced to Russell and Bond, managers, the commission he had agreed to pay them?

A. Not necessarily, no, sir.

Q. Well, if he were going to pay them 25 percent commission, he would have to pay them 25 percent commission.

A. The Company might pay it. Public Service deducted 25 per cent from us when they ceded our portfolio.

Q. I am not asking you about that. That was a different kind of transaction. I am asking you about this particular transaction. Mr. Lotz agreed to pay Russell and Bond 25 percent commission, didn't he? You have answered that yes? [800] A. Yes.

Q. And he could only retain from Mid-States fifteen per cent advance commission?

A. That is right.

Q. So he would be out-of-pocket the difference between the fifteen per cent advance commission and the twenty-five per cent he had to pay Russell and Bond, wouldn't he?

A. That is not necessarily so.

(Testimony of Mark M. Hart.)

Q. In any case, he didn't have any funds at that time with which to pay Russell and Bond, did he, because you had gotten them all?

A. But it isn't necessarily so that he would have to pay the fund to Russell and Bond.

Q. Well, who would pay it for him?

A. Suppose Mid-States agreed to take seventy-five per cent premium dollar. I don't know.

Q. Well, that would be rather rank speculation, wouldn't it? A. No, sir.

Q. Are you seriously telling this Court that you think an insurance company would allow their sub-agents to write business with a twenty-five per cent commission, having only a fifteen per cent advance, and still assume an additional twenty-five?

Mr. Bronson: I object to the form of the question. Pretty serious—. He is under oath here and making the statement.

Mr. Garrison: All right. [801]

Mr. Bronson: It is argumentative.

Mr. Garrison: All right.

Mr. Garrison: Q. But, anyway, that is your testimony, that you didn't think Lotz was going to pay the commission, is that right?

A. Never occurred to me that he would pay the commission.

Q. That didn't occur to you? A. No.

Q. You didn't inquire who was going to pay it?

A. No.

Q. You knew he didn't have the money?

A. Why, I knew he wasn't very liquid.

(Testimony of Mark M. Hart.)

Q. Well, you knew that they had scraped the bottom of the barrel up to the time you got there and only got \$8,000? You knew that all right?

A. Yes, sir.

Q. And you knew they hadn't been successful in making any loan with a bank?

A. Oh, to that point, I knew that too, yes, sir.

Q. And you had helped them try to get a loan at the Central Bank yourself, hadn't you?

A. Yes.

Q. And were unsuccessful?

A. It wasn't denied.

Q. But it wasn't made? [802]

A. Up to that point, no, sir.

Q. Well, by that 17th of September you had been paid approximately \$144,000, hadn't you?

A. I am not sure of that date or figure, Mr. Garrison.

Q. Well, I ran a tape on these figures last night, and ask if you can look at that tape and see if that refreshes your recollection as to the payment that was reported in the teletype messages, and if they don't total \$144,698?

A. The total of this tape is \$144,698.

Q. You can account for sixty of it?

A. Yes.

Q. Or about half—

A. Yes, I would say that is right.

Q. So that as of that date, then, assuming these premium collections you had received had all been American Fidelity collections, you had been paid,

(Testimony of Mark M. Hart.)

then, all the money Lotz had outstanding on his books belonging to you?

A. Not necessarily.

Q. Well, on your own figures you said he had \$140,000 coming, and we have just now collected and paid you one hundred forty-four.

A. Mr. Garrison, I can indicate what I mean if you will pick up that tape again, sir.

Q. Certainly.

A. I mean, you have an item on there, for example, of [803] \$4,300. That \$4,300 was a commission credit from us.

Q. I could be very mistaken, but I take my information from the teletype—page 6, counsel—dated 8/30 to Mark Hart, “have you received deposit slip covering commission check in the amount of \$4,300—\$4,304, from Central Bank and dated 8/14”

A. That’s right. But that is not a reduction of his accounts receivable. That is our commission.

Q. Did you send him that check?

A. Yes. Your last exhibit which you just presented shows that.

Q. And he took your check and deposited it?

A. Yes, sir.

Q. So that to that extent it didn’t represent accounts receivable collections.

A. That one item, yes.

Q. Do you know of any other?

A. May I think about it for a second?

Q. Certainly.

(Testimony of Mark M. Hart.)

A. I think the others shown on your tape must be all pure collections.

Q. Certainly they are. Now, Mr. Hart, you know about the requirement of agents to have trustee accounts, do you not? A. Yes, sir.

Q. And you require your general agents to maintain your [804] premium funds in trustee accounts?

A. That depends upon the state. California, yes.

Q. You are familiar with Section 1730 of the Insurance Code which makes it a crime to use premium funds for purposes other than the payment of the account of the company for whom the business is written? A. I am.

Q. And it is perfectly proper, is it not, for one general agent to commingle the funds of several companies in his trustee account?

A. I don't think there is any restriction against it.

Q. No. The only restriction is that he not commingle his own funds with the company's funds?

A. Yes, sir.

Q. And you knew that in respect to any collections that Mr. Lotz made, or Mr. Smead made for him, of premium receipts for business written by Mid-States, that they were trustee funds and he held them as a trustee in his trustee account.

Mr. Bronson: What company are you referring to, Mr. Garrison?

Mr. Garrison: I said Mid-States Insurance Company.

Mr. Bronson: At what time?

(Testimony of Mark M. Hart.)

The Witness: A. I knew that when, Mr. Garrison?

Mr. Garrison: Q. You knew that from the first day you entered the state of California as an insurer, that the law [805] relating to agents that they received the premiums from their writings as a trust and had to keep them in a trustee account?

A. Yes, but I don't believe you asked the question that way. But yes, I did know it.

Q. Well, maybe the specific statute was adopted some time later than you came in, but you had known for a long time that in California, at least, that is the character, premium funds received——

A. (Interposing) No question about it.

Q. There isn't any point in quibbling about it.

A. No question about it.

Q. And you knew that receipts that Mr. Lotz received, money that Mr. Lotz received for business he wrote in Mid-States Insurance Company were so characterized as trust funds, didn't you?

A. I make a distinction, Mr. Garrison, between trust funds and the California Insurance Code that calls for the maintenance of a trustee account.

Q. Well, I will adopt your interpretation of California laws. It does say that if a fiduciary doesn't—that he must——

Mr. Bronson: The law is the best evidence of that, Your Honor.

Mr. Garrison: I am asking him what he knows about it. He says he knows about it, and that when

(Testimony of Mark M. Hart.)

an agent receives premiums, he receives them as trust, as a trustee fund. [806]

The Witness: A. That is the California Code, as I understand it.

Mr. Garrison: Q. That is a correct understanding, and that is what we are talking about is the California Code. A. Yes, sir.

Q. So that you knew in August and in September and October and November and December of 1951 that that was the fact respecting Mr. Lotz' premium income?

A. Certainly.

Q. What was Mid-States' was Mid-States' and what was yours was yours.

A. No, I don't—I still don't interpret the California Code as that.

Q. Well, let's see if we agree on this: that at least insofar as the California law is concerned, that Mr. Lotz received the premiums as a trustee?

Mr. Bronson: I object to that as a legal conclusion.

The Court: If he knows, he may answer.

Mr. Garrison: He said a minute ago that that was true.

Mr. Garrison: Q. Didn't you?

A. May I explain my interpretation?

Q. No, just answer my question.

The Court: Answer it and make any explanation you wish.

The Witness: Thank you.

(Testimony of Mark M. Hart.)

Mr. Garrison: Q. After you have answered the question. [807] A. Yes, I understand.

Q. Isn't it true that at that time you knew that the funds that Lotz received on account of Mid-States writings were trustee funds and belonged to Mid-States, and that the law required him to hold them and pay them only to Mid-States?

A. No, and I would like to explain.

Q. All right. Now you may explain.

A. My interpretation of the Code, and I could be incorrect, is that premium monies collected by insurance agents must be kept separate and apart from the general operating funds and kept in a trustee account. To that extent I am very familiar with it.

But I don't know that that connotes a trust relationship between the companies, between the individual companies, and the agent. I am not an attorney and I am not sure whether or not I am right. That's what I have been trying to say.

Q. I think that expresses your views clearly. I understand what you are saying.

Do you remember when your deposition was taken on October 16, 1952, at 48 Wall Street, New York?

A. Yes.

Q. You were under oath on that occasion?

A. Yes, sir.

Q. Calling your attention to page 54 of that deposition——

Mr. Garrison: I would like, if I may, Your Honor, to [808] show it to the witness.

(Testimony of Mark M. Hart.)

The Court: Certainly.

Mr. Garrison: Q. I would like to ask if you were asked these questions and gave these answers. Reading from the upper portion of the page:

“Question: I am speaking now of this particular block that was written sometime in September or October of 1951.

“Answer: If there was a block written in September or October we did not participate in any extent.

“Question: Would it be true, then, that your Company had no right to participate in any of the premiums paid in that insurance?

“Answer: Of course not.”

Were you asked those questions——

A. Yes.

Q. ——and gave those answers?

A. Yes, sir.

Mr. Garrison: I have lost a page reference here someplace. I will have to come back to that. I can't take up the Court's time looking for it.

Mr. Garrison: Q. Going back, now, to your Oakland trip, you say that you gave this contract that you drew up for Lotz to sign the morning you were leaving Oakland? A. Yes, sir.

Q. You handed that contract to Lotz, did you?

A. Yes, sir.

Q. After he signed it? A. Yes, sir. [809]

Q. And then you gave the envelope to Smead?

A. I didn't personally give it to Smead.

Q. Mr. Feller did? A. Yes, sir.

(Testimony of Mark M. Hart.)

Q. Why was that envelope sealed?

A. Well, it was sealed because it was an arrangement of compensation that we made with Mr. Smead, and since he was an employee of Lotz, we felt it was a rather delicate subject.

Q. You didn't want Mr. Lotz to know about it?

A. Of course, if Mr. Smead desired to tell him.

Q. Sealing wouldn't be necessary to maintain that secrecy, would it? It could have been folded over?

A. Oh, I guess so, sure.

Q. Why wasn't that subject discussed with Mr. Lotz or Mr. Smead prior to that time?

A. It was discussed with Mr. Smead. It wasn't discussed with Mr. Lotz for the same reason I have just given.

Q. I thought you testified yesterday that you didn't discuss it with Mr. Smead?

A. Well, we asked—we told Mr. Smead the night before at the Leamington Hotel that we had decided that rather than put someone else in there to supervise our affairs, we would like to appoint him, and he agreed to it.

Q. Didn't you testify yesterday you didn't discuss it with Mr. Smead? [810]

A. That's the payment of the \$1,000.

Q. Yes. A. I didn't say that, no.

Q. You didn't say that? A. No.

Q. Thereafter, this appointment that you made in this contract, you looked to Mr. Smead, did you not, for the handling of your affairs in Lotz' office?

(Testimony of Mark M. Hart.)

A. Yes, sir.

Q. You gave him supreme authority?

A. Yes, sir.

Q. Over your affairs? A. Yes, sir.

Q. And he was to get that \$1,000 only in the event you got your account paid by September 15th, wasn't that right? A. That is correct.

Q. And you knew when you made that arrangement it wasn't physically possible for them to do it?

A. We thought it was psychological.

Q. I didn't ask you that. You knew it wasn't physically possible for them to pay you \$140,000 in the next 25 days?

A. We felt that it wasn't possible, that is correct.

Q. So that was the deal, the offer to Smead psychological also?

A. No, we intended to pay him irrespective of when it was [811] collected.

Q. Well, he was being paid by Mr. Lotz, wasn't he?

A. He was a salaried employee of Mr. Lotz, that's right.

Q. And it was his duty as such employee to pay accounts of all companies, wasn't it? That's what he was there for as general manager for him?

Mr. Bronson: That calls for his conclusion unless there is a foundation laid.

Mr. Garrison: Well, that's the normal duties of a general manager, to pay the accounts——

Mr. Bronson: I object——

(Testimony of Mark M. Hart.)

Mr. Garrison: If the Court please, Counsel is just interrupting me with discussion over here. If he has an objection I will yield and let him make it, but if he is going to just ramble on and get my mind distracted, I think the Court ought to require him to state his objection or not discuss it with me.

Mr. Bronson: I'm afraid you didn't hear me. I said it calls for a conclusion.

The Court: I will admonish you, we will proceed orderly.

Mr. Garrison: Now, whether you knew what Mr. Smead's functions were or not, he was paid by Mr. Lotz, you knew that? A. Yes, sir.

Q. And it is the duty of every general manager to pay all of their accounts as they come due, if they can, out of the [812] funds? A. Yes.

Q. Well, why did you think it was necessary to pay him a thousand dollars for work that he might have to perform between that date, which was August 22nd, and September 15th, or soon thereafter, whenever your account would be paid, which would be at the most a month or two? Didn't you think that was a rather substantial payment to a young man already on salary?

A. No. May I explain?

Q. Certainly.

A. Our first thought was to put somebody in there, and we thought of an accounting firm here in San Francisco, and that would have cost us a fee that was much more substantial than the \$1,000 we offered to pay Mr. Smead.

(Testimony of Mark M. Hart.)

Coming back to your question, the reason that we felt that it was necessary to have Mr. Smead do this is that we didn't think Mr. Lotz was competent to manage his financial affairs, and we wanted to limit him to certain drawings for his own expenses and salary. We wanted Mr. Smead to see that that was adhered to.

Q. Have you quite finished? A. Yes, sir.

Q. So it was your opinion a thousand dollars in additional compensation to Mr. Smead was reasonable, contemplating you [813] pay out in the next twenty-five or thirty or forty days?

A. Well, we knew it would take longer than that.

Q. I believe you testified that sometime in September, Mr. Smead contacted you and said that the Mid-States had an account due of \$27,000?

A. \$29,000.

Q. Twenty-nine thousand? And asked if he should pay it? A. That's right.

Q. Why was it necessary that Mr. Smead ask you if he, as a licensed insurance agent, should pay the account of another insurance company?

A. I can't answer for Mr. Smead's motives. It wasn't necessary for him to ask us.

Q. Nothing in the arrangement that you had made with him that you can explain might have prompted him to do that? A. No, sir, nothing.

Q. I believe you said that you didn't tell Mr. Smead to destroy teletypes that might be harmful to you? A. I said I didn't.

Q. Did not? A. That's right.

(Testimony of Mark M. Hart.)

Q. And there isn't any doubt in your mind about the fact that you didn't tell him? A. No.

Q. Well that brings us down, in any case, to about September [814] the 17th insofar as these payments on your account are concerned, and I figured up you had been paid \$144,000, and you called my attention to \$8,000 that was a commission. A. \$4,000.

Q. So that that leaves us undisputed a payment to you within twenty-five or twenty-seven days of \$140,000 of collections by the Lotz Agency, doesn't it? A. That's correct.

Q. So that you were somewhat mistaken, were you not, in the ability of Mr. Smead and Mr. Lotz to collect by September 15th, or were you talking in your contract about their collecting the whole \$240,000?

A. The liquidation of the \$240,000. There wasn't \$240,000 to collect, Mr. Garrison.

Q. No. Some of it you were going to take care of by crediting his account with earned commissions? A. Yes, and many other ways.

Q. And that could have been accomplished by the stroke of a pen, couldn't it? Wouldn't take any work or any part on Mr. Smead's part to do that?

A. No. No work at all.

Q. So that everything that Mr. Smead and Mr. Lotz could do under your contract and direction was accomplished by September 17th, wasn't it? All collections had been made of \$140,000? [815]

A. Not everything Mr. Smead could do, no, sir.

(Testimony of Mark M. Hart.)

Q. Well, everything that could be done in respect to collecting your premiums had been done, hadn't it? A. Yes.

Q. By September 17th? A. Yes, sir.

Q. That is, assuming that you had \$140,000 coming? A. If that is correct.

Q. If we take your figures? A. Yes.

Q. If we take the figures that the auditor found to be due, they had collected one-hundred per cent more than you had coming for your account?

A. If we take that figure.

Q. But at any rate, we now have as of this date, September 17th, assured your accounts receivable in the Lotz office? A. Apparently.

Q. Well, whose premiums did you think you were going to get after that date when they made collections and sent them to you? A. Nobody's.

Q. You knew they made collections after that date and sent them to you, credited them into your account in the Central Bank, didn't you?

A. I'm not sure whether it was premiums or commissions. [816]

Q. Well, let's see if we can make you sure. On September 21 you teletyped to Mr. Smead as follows—Page 11:

"Mark Hart to Ralph S. Smead. Sorry for error in my figure. Actual balance today is \$105,000. American Plan Loan of \$50,000 reduced to \$39,000 by application of July and August commissions.

"Balance, therefore, of \$66,955. But we would also like you to clear up amount due this organization

(Testimony of Mark M. Hart.)

of \$39,000. What is your specific reply to my urgent request for liquidation before company auditors arrive and preferably within the next five days."

Now, where did you think they were going to get premium income to pay you this additional \$66,000 if they had already exhausted your accounts receivable?

A. I wasn't talking about premium income. They were still talking about a \$50,000 loan. And they were entitled—We understood they were writing approximately \$100,000 a month for Mid-States on which they were entitled to deduct fifteen percent commission, or fifteen thousand dollars.

Q. Well, you knew that the loan thing was a miss and not in the realm of reasonable possibility?

A. No, I didn't. Later than that date Mr. Smead told me it was approved. [817]

Q. But you know that the likelihood of making such a loan—you tested it out yourself when you were in Oakland in August?

Mr. Bronson: That is an argument.

Mr. Garrison: Q. Didn't you know, as a matter of fact, that likelihood of a loan was exceedingly remote?

A. No, sir, I didn't know it was exceedingly remote.

Q. Well, you know they were never able to make it?

A. I was told by Mr. Smead that they had one consummated.

Q. But they never made one, did they?

(Testimony of Mark M. Hart.)

A. To my knowledge, no.

Q. Certainly not. Now, Mr. Smead, or Mr. Lotz, rather, or both of them said, in reply to you on the same day:

“To Mark Hart from Joe Lotz and Ralph Smead: In reply to your teletype of this morning, will have approximate deposit Monday of \$30,000. Working on loan for new balance.”

Where did you think that the \$30,000 was coming from?

A. Mr. Garrison, Mr. Lotz had told us, for one thing, that he had \$9,000 a month approximately in commissions coming from Mid-States under their old retrospective plan. He had a fifteen percent pre-paid commission with Mid-States which would bring him a substantial income. He had income from other companies, from life insurance and so forth and so on.

Q. Well, how did you think he was going to pay his overhead? He had paid you every penny he could collect for the last four [818] months, \$140,000?

A. No, not quite. We left some money in his trustee account, if you notice.

Q. Well, then on the 26th of September, he says: “Would you advise Mr. Hart we deposited \$15,000 to A.F.C. account? End.”

And the message comes back:

“What about previous Sixteen Thousand that you told Mr. Hart about? Deposit figure should be fifteen thousand, and that is from the sixteen thou-

(Testimony of Mark M. Hart.)

sand figure. We still have some money in our trust account, fifteen thousand over and above the fifteen previously mentioned above. No, it is not. That is the deposit. Statements have been mailed."

Did you have any idea where they were getting that money?

A. My conclusion was that——

Mr. Bronson: Wait a minute. You left out a word. "Statements were mailed yesterday. Commissions." Am I correct in that?

Mr. Garrison: Yes, "Commissions."

Mr. Garrison. Q. Well, he didn't have \$16,000 in commissions coming from you?

A. Not from us, no.

Q. All right, going to the 27th. To Mr. Hart from Smead, [819] apparently:

"Can't get phone circuit to your office. It will not be necessary for you to call Smead in Santa Monica. Funds of his are being mailed to us today. We are making drive to see how much balance can be reduced by the first. Joe is working on loan now. Should have some info today. Do you have any further instructions? Ralph Smead.

"Go ahead. Will teletype you tomorrow to get up to date story as frankly am deeply concerned about the attitude assumed by Company if their auditors uncover the delinquency. Relying on you to do your utmost and to keep me posted everyday by teletype."

Where did you think they were going to get funds

(Testimony of Mark M. Hart.)

to pay your account except from premium income of other companies?

A. I thought that they were going to get funds from this loan that they were talking about—(A). and (B) from commissions earned under their writings for Mid-States, which we understood were substantial.

Q. On the 27th your operator teletyped to Mr. Smead and Mark Hart:

“This is our last working day of the month. Must have some definite and positive information your intentions or will be advised to take drastic [S20] steps immediately. Hope this will be unnecessary. What is the score? Go ahead.”

Then it says:

“Mr. Smead is out.”

“American Plan Operator:

“I think this is a stall. Unless I hear from Mr. Smead before tomorrow morning will take necessary action including advice to Insurance Department and other local authorities unless you can find Mr. Smead.”

You expected \$105,000 balance would be paid, then, in this period out of his commissions from other companies?

A. Not entirely, no, sir.

Q. What other source did you think he would use?

A. He was still working on the loan. He was still assuring us he had a loan coming through. And we still had \$60,000 of commissions due him, approxi-

(Testimony of Mark M. Hart.)

mately. Somewheres between fifty-three and sixty, I should say.

Q. He didn't have to collect those commissions. Those commissions were on your books to his credit, weren't they? A. As they earned.

Q. As they earned. That had nothing to do with your pressing him to go out and raise money? That was on your books to his credit as they were earned?

A. As they were earned. [821]

Q. That had nothing to do with this business we are talking about, did it?

A. But I thought you said, how did you expect to liquidate your balance.

Q. By collections, I mean.

A. By collections from commissions and loan.

Q. Certainly.

The Court: Recess to two o'clock.

(Whereupon this cause was recessed to the hour of 2:00 o'clock p.m. this date.) [822]

MARK M. HART

a witness called on behalf of the defendant herein, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Mr. Garrison: Q. Mr. Hart, what were you going to report to the Insurance Commissioner and other officials in September of 1951 when you tele-

(Testimony of Mark M. Hart.)

typed Mr. Lotz you were going to make that report unless you could find Mr. Smead?

A. I suppose I was going to report to the Insurance Commissioner the fact that the Lotz Agency was delinquent in their balance to us.

Q. Delinquency in and of itself wouldn't be a matter of particular concern to the Department, would it?

A. If it was caused by violation of the trustee account, it would be.

Q. What were you going to report to the other local authorities?

A. What other local authorities?

Q. I don't know. You used the expression.

A. Would you refresh my memory?

Q. Surely (handing document to the witness).

Mr. Garrison: Top of the page.

The Witness: At this moment I can't say, other than——

Mr. Garrison: Q. Is that more psychological?

A. Possibly a collection device.

Q. As I understood you before luncheon, you said that you assumed that Lotz and Smead were getting their funds from earned commissions, advance commissions from Mid-States?

A. In part, yes.

Q. And you knew, didn't you, that the arrangement that Lotz made with Mid-States for any advance commissions wasn't made until September—the September contract?

A. I believe it was September 1st, yes.

(Testimony of Mark M. Hart.)

Q. Yes. And that he wouldn't receive any of those advance commissions until he had written business, after September 1st?

A. That is correct. [824]

Q. And had collected the premiums?

A. That is correct.

Q. And he would only receive it to the extent that he did collect premiums?

A. That's right.

Q. And he only got fifteen per cent advance commission? A. Yes, sir.

Q. So that if he wrote as much as a hundred thousand dollars in the month of September, and if he collected all of his premiums in the month of September, he would only have been entitled to \$15,000 under that arrangement, wouldn't he?

A. That is correct.

Q. Well, we find ourselves down now to the point in your relationship with Mr. Lotz when you had a balance due of sixty-seven thousand odd dollars. I believe that was in October?

A. I think that is right.

Q. Sixty-one after you deducted the \$5,000 expenses.

A. What expenses, Mr. Garrison?

Q. Well, didn't you deduct some expenses to arrive at a round figure of \$61,000 balance due from Lotz?

A. That would tend to increase the balance. You mean expenses charged against Mr. Lotz?

Q. Yes.

(Testimony of Mark M. Hart.)

A. That would tend to increase the balance.[825]

Q. Well, you did arrive at a \$61,000—\$71,000 figure, didn't you? A. Yes, sir.

Q. I guess it was sixty-one before and then you added expenses? A. That is correct.

Q. Made it seventy-one.

A. But that was October 31st.

Q. I said October. By the way, I asked you earlier if it weren't a fact that Mr. Cass, who arranged the contract between your company and Lotz, didn't work for you at the time that contract was entered into between you, and you said no, he didn't work for you. The fact is, he was your agent at that time, wasn't he?

A. Mr. Cass was a free lance special representative consummating agency agreements between our company and various agents, or for any other company.

Q. Well, all right. I said he was employed by you. A. Employed, you said.

Q. I beg your pardon.

A. I believe you asked if he were employed by us.

Q. Yes, and you said no. A. That's right.

Q. Now, you say he was a special agent on a free lance basis appointing agents. [826]

A. That is right. Working on a commission basis.

Q. For compensation?

Mr. Bronson: Wait a minute.

Mr. Garrison: Q. Go ahead.

(Testimony of Mark M. Hart.)

A. There are several specialists around the——

Mr. Garrison: Q. I am not interested in several specialists. I am talking about Mr. Cass.

A. All right. Mr. Cass was an automobile finance specialist.

Q. He appointed agents for you? A. Yes.

Q. And received some compensation for it?

A. Yes.

Q. He did arrange the Lotz appointment with your company, didn't he? A. Yes, sir.

Q. And at the time he knew considerably about Mr. Lotz and Mr. Lotz' affairs, when he made the appointment? A. I imagine so.

Q. That is what I had reference to this morning. So that you did have some conversations with Mr. Hatfield about the \$61,000 balance that was still owing to you by Mr. Lotz and the proposal of rewriting that business, taking it out of your company and putting it on the books of the Mid-States Insurance company? A. Yes, sir. [827]

Q. And you had conversations about that with Mr. Smead and Mr. Lotz?

A. I am not sure with Mr. Lotz, but definitely with Mr. Smead.

Q. So, as I understand it, you had that much business on your books and it was all in arrears.

A. As of what date, sir?

Q. As of the date we are talking about, October 31st.

A. No, I can't say it was all in arrears.

Q. Well, was it or wasn't it. A. Partially.

(Testimony of Mark M. Hart.)

Q. Referring again to your deposition, and commencing on page 63, at the bottom of the page, I will ask you if these questions were asked and if you gave these answers:

“Question: But there was some of it, though, that had been written beyond the credit period of Lotz with your company, wasn’t there?”

“Answer: It might have been.

“Question: So there would have been some that he would have been in arrears of at the time it was transferred over?”

“Answer: All of it was in arrears. He just told us he did not have the \$60,000 to pay us. But he had arranged with Hatfield to rewrite.”

Did you give that testimony? A. I did.

Q. Does that refresh your recollection?

A. It does, but that is inaccurate.

Q. At least some of it was in arrears?

A. Yes, sir, partially in arrears.

Q. I believe you called Mr. Hatfield on October 31st?

A. That is correct.

Q. And you had a conversation that you went to the pains of recording?

A. That’s correct.

Q. Did you tell Mr. Hatfield in that conversation about this collection technique you had employed with Mr. Lotz?

A. Not at all.

Q. Did you tell him that Lotz had taken over \$150,000 of Public Service business?

A. No.

Q. Did you tell him Lotz was broke?

A. No.

Q. Did you tell him that you had cancelled Lotz’ contract?

A. No.

(Testimony of Mark M. Hart.)

Q. As a matter of fact, you told him that you hadn't cancelled his contract, didn't you?

A. I don't recall that.

Q. I will show you the transcript of the telephone conversation——

Mr. Garrison: Does Your Honor have an interruption? [829]

(Short interruption.)

Mr. Garrison: Will you read the last question?
Mr. Reporter?

(Whereupon question was ready by the Reporter.)

Mr. Garrison: Q. I read you your statement to Mr. Hatfield to refresh your recollection of the conversation:

"Hatfield: You didn't kick them out, I know that."

A. Excuse me, counsel, I haven't reached it.

Q. Page 7, last line. A. Yes.

Q. (Reading)

"Hatfield: You didn't kick them out, I know that.

"Hart: No. We want to get through. No, we didn't kick them out, of course not."

That is what you told Mr. Hatfield, is it not?

A. That's right.

Q. As a matter of fact, his contract has been cancelled as of August 20th, isn't that right?

A. That's right, but we didn't kick him out.

Q. You make a distinction? A. Oh, yes.

Q. You didn't kick him out?

(Testimony of Mark M. Hart.)

A. That's right. [830]

Q. Your statement to Mr. Hatfield is a fair statement, in your opinion, is it, about the relationship with you and Mr. Lotz at that time?

A. Yes, it is.

Q. All right. The fact of the matter is that you tore up all the policies that were in Mr. Lotz' office when you went out to Oakland, didn't you?

A. I certainly did.

Q. And isn't it true that in your meeting with him on August 13th in New York, whether or not you tentatively kicked out the contract, cancelled the contract, you actually suspended his writing powers by telling him not to write any more?

A. No, I didn't. He was still writing when we got there on the 20th.

Q. But you stopped him effectively as of August 22nd?

A. Yes, sir.

Q. And he wrote no more business for American Fidelity and Casualty Company after August 22nd, did he?

A. With few exceptions. They had some policies going through the procedure.

Q. Excepting those that might have been in the machine?

A. Yes.

Q. Everything else was torn up?

A. That's right.

Q. What did you tell Mr. Hatfield about that?

A. I didn't tell him anything about it.

Q. Reading from the telephone conversation, on page 2:

(Testimony of Mark M. Hart.)

“Hatfield: Yes. How old is it?”

“Hart: September.

“Hatfield: September?”

“Hart: September and there’s some August. But, you see, the September business is not due under our contract. We have 75 days.

“Hatfield: Sure.

“Hart: Actually until December 15th.

“Hatfield: Yes.”

Now, what business did you have written in September?

A. None whatsoever. That was an error that I realized after I read this.

Q. Well, that had a very, very great significance insofar as Mr. Hatfield’s accepting this business is concerned, whether any of it was written in September or August or prior? Wasn’t that the significant circumstance in that transaction?

Mr. Bronson: Wait a minute. Significant to Mr. Hatfield, you mean?

Mr. Garrison: It’s significant to Mr. Hart, too, counsel, and I think you will admit it.

Mr. Bronson: Let’s have the question.

Mr. Garrison: I withdraw the question. It is obviously significant. [832]

Mr. Bronson: Well, now——

Mr. Garrison: Q. Your testimony now is that it was an error that you made then?

Mr. Bronson: Your Honor, how does counsel on the opposite side contend with this situation? I don’t want to tread on anybody’s——

(Testimony of Mark M. Hart.)

The Court: (Interposing) I realize that you are helpless under certain circumstances.

Mr. Garrison: I have never seen Mr. Bronson helpless, Your Honor, up to now, and I don't think he is helpless now.

The Court: What I might suggest is that your questions are rather argumentative.

Mr. Garrison: Well, I don't want them to be and I will try not to have them.

The Court: All right. [833]

Mr. Garrison: Q. As I understand your testimony now, that was a mistake you made and you discovered it later when you read the transcript.

A. When I either read it or listened to the record, yes.

Q. You didn't tell us anything about this mistake when we took your deposition in New York, did you? A. I don't think it came up.

Q. We talked about the telephone conversation.

Mr. Bronson: I will ask that the record be produced, Your Honor, in lieu of this guessing.

Mr. Garrison: Q. You remember our asking you about the telephone conversation in your deposition? A. Yes.

Q. And you didn't tell us you made a mistake.

Mr. Bronson: I object to that. The record is lying right at his right hand and it is the best evidence of what was said in there.

Mr. Garrison: Well, there's nothing in there about it, and Mr. Hart knows it.

(Testimony of Mark M. Hart.)

The Witness: I don't think the question was asked.

Mr. Garrison: Q. You didn't feel it incumbent upon you to make any explanation at that time or since that time until today.

Mr. Bronson: Incompetent, irrelevant and immaterial, Your Honor. [834]

The Court: Ask him what was asked.

Mr. Garrison: I say, Your Honor, the present question is that he didn't feel it incumbent upon himself to make any explanation since that date until this date.

The Court: You may answer the question.

Mr. Bronson: Again I suggest the record—this is very unfair unless the record is read.

Mr. Garrison: But there's nothing in the record.

The Court: Counsel indicates there is **nothing** in the record.

Mr. Bronson: Then why go into it? He says why didn't he bust out with a voluntary statement about something that wasn't even inquired into.

The Court: In the interests of time I will allow him to answer the question. Go on. What is **your** answer?

The Witness: A. I didn't volunteer that information. Frankly, it never occurred to me.

Mr. Garrison: Q. Very well. When did you first see the statements that Mr. Smead—the several statements that Mr. Smead and Mr. Lotz prepared, including the supplements that were made to them?

A. I can't exactly fix the date, but I don't be-

(Testimony of Mark M. Hart.)

lieve it was until the bank intervened in the so-called bank case. I am not certain of the date. I am not certain of the date.

Q. Well, didn't Mr. Titus tell you about them when you met [835] him in Chicago at that meeting?

A. He told me he had them.

Q. Didn't you thereafter inquire in Oakland regarding them? A. I don't believe so.

Q. At any rate, at some time you did see them and read them? A. Yes, sir.

Q. And you have since characterized them, at least in the most part, as being false?

Mr. Bronson: What? May it please the Court, the testimony stands for itself, whether it is for the most part, least part, or what.

Mr. Garrison: Well, this is cross-examination. I don't see how I can get about the subject without asking that question.

The Court: I will ask you to listen to the reporter on that question. Mr. Reporter, will you read that question?

(Question read.)

The Court: Characterized what?

Mr. Garrison: Statements that Mr. Smead and Mr. Lotz wrote out on December 6th and thereafter. Mr. Hart testified on direct examination that they were false in most particulars.

The Court: You may answer.

Mr. Garrison: He didn't touch on every word, but——

Mr. Bronson: I spent an hour, or half a day,

(Testimony of Mark M. Hart.)

rather, yesterday bringing out with each of the several statements—I believe there are four of them—those parts in which this [836] witness says they are false and the parts in which he thinks they are true. Your Honor heard that at great length and this adds nothing at all. It is already thoroughly covered.

Mr. Garrison: It was covered by him, but it hasn't been covered by me. I don't propose to go into the details of the statements. I just asked him if he didn't in his direct testimony go through the statements and answer, at least substantially, that the statements therein were false.

The Witness: A. The answer is yes.

Q. Yes. Of course you did. There is no argument about it. You took Mr. Smead's and Mr. Lotz' statement that I prepared in my office and went right down the line with Mr. McKinnon and on all material points said the statements were false? That is true?

A. I don't know about all material points.

Q. Well, substantially all.

A. Substantially, I said they were not true.

Q. Did you do the same thing with respect to Mr. Smead's statement dated December 6, the ten-page statement?

A. If Mr. Bronson's questions directed to me came from that, yes.

Q. And it is your present testimony, then, that insofar as the statements in this statement coincide

(Testimony of Mark M. Hart.)

with the ones that Mr. Bronson asked about, they are false? A. Substantially. [837]

Q. That is what I mean, of course. And you know and you knew when you first saw them and Mr. Smead and Mr. Lotz had had their signatures acknowledged before a notary? A. I saw that.

Q. You knew that when they were signed by each of those gentlemen, that they were signed in the presence of their lawyer? A. I heard that.

Q. And yet you believe that Mr. Smead had deliberately told untruths in that statement?

A. I know he did.

Q. Did you know it then?

A. When, Mr. Garrison?

Q. When you first saw them. A. Oh, yes.

Q. When you first read them. Well, why would you hire a man like that in January of 1952?

A. I think I explained that yesterday.

Q. Explain it again.

A. I will. The cancelled policies returned by assureds and sub-agents, the loss reports and other loss data, were piling up in the office—the former office of Joseph Lotz, which I understood was under the custody of Mid-States, and as a result we had a terrific backlog of work to perform.

We had many, many complaints from assureds and sub-agents, [838] and in the interests of serving the public, the insuring public, it became very vital for us to dispose of these cancellations and losses.

The only man that knew what it was all about, and the only man we could turn to in this emerg-

(Testimony of Mark M. Hart.)

ency was Ralph Smead, and that's why I hired him.

Q. And that's the only reason?

A. Why, yes.

Q. Then why, six months later, did you promote him to Pacific Coast manager for your company?

A. I didn't promote him, actually. Actually, it was an entirely new job, entirely apart from his first capacity for which he acted for us—under which he acted for us—and Mr. Smead had discharged his duties with respect to the first assignment extremely well and asked for a chance to produce business for us.

Q. Well, at any rate you did employ him as your Pacific Coast branch manager?

A. For a while, yes.

Q. And you employed him in that capacity until the bank case was over, didn't you?

A. When was the bank case?

Q. The bank case was over in May, 1952—1953, I should say.

A. Well, then, if we terminated his employment in October, 1953, we did employ him until after the bank case. [839]

Q. That's right. We have heard reference to a \$50,000 loan. That transaction, as I understand it, was simply a credit on your books of Mr. Lotz' account with you.

A. Yes, but that was adjusted to thirty eight or thirty nine thousand.

Q. Thirty eight or thirty nine thousand?

A. That's right.

(Testimony of Mark M. Hart.)

Q. It turned out not to be fifty, but thirty eight or thirty nine? A. That is right.

Q. And the effect of that transaction, or that contract on his account, was to permit you and others in your company to be in a position to be able to say to anyone who inquired that Mr. Lotz' affairs with you were current?

A. That is not correct. That was not the intent.

Q. I didn't ask you about the intent, I asked you about the effect of it.

A. I am sorry, that was not the effect of that.

Q. It did permit you to say the account was current, didn't it?

A. I suppose that incidentally it did.

Q. Not incidentally. It did permit you to say to anyone if they were to inquire the account with Mr. Lotz was current. A. Yes, it did.

Q. Yes, it did, of course. And wasn't the purpose of that so [840] that if Mid-States should call you you would be able to give them that information and allay their suspicion that maybe Lotz was in financial difficulties.

A. No, that is not correct.

Q. Well, in any event, you gave specific instructions to your associates in the company to the effect that they were to so advise anybody who so inquired? A. Yes, I did.

Q. Reading from page 3 of Plaintiff's Exhibit 35, dated August 29, the letter reads:—this is a letter from you to Mr. Will.

“In closing, you are instructed to inform anyone

(Testimony of Mark M. Hart.)

who inquires that Joe Lotz is up to date in his accounts with us and is not delinquent. This is not only extremely important, but it is actually true as Joe Lotz' May balance is technically paid and his June balance is not due until September 15th, 1951."

Why was that so extremely important?

A. May I explain?

Q. Certainly you may.

A. Mr. Garrison, the insurance business is a goldfish bowl in that everybody inquires of other companies the status of agents. Mr. Lotz represented, in addition to Mid-States, life insurance companies and other insurance companies, and it was [841] within the realm of possibility that he would apply to other companies for representation.

I was interested in keeping Mr. Lotz in business to collect our money. And, among other things, I felt very sorry for Joe Lotz, who I have always considered to be extremely honest, and for that reason I wanted to be certain that our treasurer told the truth, namely, that he was not delinquent and not in any way besmirch him or spoil his chances with any other company he may represent.

Q. That was written on August 29, 1951?

A. That's correct.

Q. Right after you had come out to Oakland and had developed this tremendous concern about his financial affairs?

A. That was written after I came out to Oakland.

(Testimony of Mark M. Hart.)

Q. When you knew that he was in extremely bad financial condition?

A. I knew he wasn't liquid.

Q. Well, you knew that he had—that he was trying frantically to borrow money from the bank.

A. I knew that he was trying to borrow money.

Q. And you knew that he had been in default in his contract with you and was in arrears and would still be in arrears if you hadn't made this entry on your books to bring him current, didn't you?

A. Yes, but that was not the purpose of the entry on the books. [842]

Q. No. But the effect of it was to permit your people to say that he was current, and that is only half the truth, isn't it, Mr. Hart?

A. No, not the way you use the word, Mr. Garrison. You are saying, "effect", instead of "intent". If you ask me what the intent was, I will tell you.

Q. You told us. You alluded yesterday to the Public—the poor Public, I think Mr. Bronson said—in respect to the affairs of the Mid-States Insurance Company in California. Do you know of a single instance where any assured did not get paid for its loss? A. Talking about us?

Q. By Mid-States Insurance Company.

A. No, I have no knowledge of Mid-States.

Q. Do you know of a single instance where an assured didn't get a refund of premium he had coming by Mid-States Insurance Company?

A. No. But that wasn't the allusion.

(Testimony of Mark M. Hart.)

Mr. Bronson: What was the answer?

A. The answer is no, but we didn't allude to Mid-States. We were talking about our own policies.

Mr. Garrison: That is all.

Cross Examination

Mr. McCallum: Q. Mr. Hart, do you recall that in one of [843] these teletype messages there is a reference made to a conversation or telephone call you made to our bank shortly after you were out in Oakland in August?

A. Yes, I have seen those.

Q. That would have been very shortly after you went to the Central Bank, is that correct?

A. Not very shortly. We went to the Central Bank, I think, in April or May.

Q. I am sorry, I didn't make my point clear. You went to the Central Bank around August 22nd, didn't you? A. Oh, yes.

Q. And at that time an agreement was entered into which has been introduced here, the substance of which you appointed Mr. Smead your exclusive agent for your financial affairs.

A. That is correct.

Q. And that has been marked Plaintiff's Exhibit 17. You recall that? A. Yes.

Q. And you gave a copy of this document to the Central Bank? A. Yes.

Q. Now, isn't it true that shortly after you gave the bank a copy of that agreement, and after your

(Testimony of Mark M. Hart.)

visit to the bank that day, some problems developed with the Central Bank and Mr. Lotz?

A. I don't recall any such problems.

Q. Didn't something occur that the Central Bank was having a [844] difficult time in accepting the program you had outlined for Mr. Lotz and Mr. Smead to follow?

A. The Central Bank wasn't part of that program.

Q. No, but didn't they raise some objection to it?

A. No.

Q. Did any question arise as to the deposit of funds in that bank by Mr. Lotz or Mr. Smead after your visit there on August 22nd?

A. Not to my knowledge.

Q. What was the purpose, then, that you called at the Central Bank?

A. I don't know. I have been mystified since I looked at those teletypes. I can't recall why.

Q. Did you make very many telephone calls to the Central Bank?

A. No, not telephone calls. We had quite a few wires in relation to the balance in our account.

Q. But you do recall speaking to someone in the Central Bank about Mr. Lotz' affairs shortly after you had signed the contract with Mr. Smead and Mr. Lotz?

A. I don't definitely recall that it was in relationship to Mr. Lotz' affairs, no, other than as a part of our banking arrangements on this automatic transfer of funds we were talking about.

(Testimony of Mark M. Hart.)

Q. Well, when the teletype says, "Things are now a little better with the Central Bank", after your call to them, do you [845] know what that has reference to?

A. No, I can't say definitely. I have an idea what it might be.

Q. But you don't know?

A. I don't know.

Q. Mr. Hart, when deposits were made in the American Fidelity account you were sent a copy of the deposit slip, weren't you? A. Yes.

Q. Did the Central Bank also send you a copy of the deposit slip?

A. I think we only received one copy of the deposit slips.

Q. Did that come from Mr. Smead or Mr. Lotz, or did it come from the bank?

A. I think it came from Mr. Smead.

Q. I see. And those deposit slips were sent to you regularly after your visit out here in August?

A. Yes.

Q. And those are the deposit slips referred to in the teletype messages? A. Yes.

Q. Now, on each one of those deposit slips there appears the branch or bank number referring to the check that was deposited at that particular time, didn't it? A. I don't know.

Q. Did you never see the deposit slips? [846]

A. Oh, yes, I saw every deposit slip.

Q. Then you know on the deposit slip the amount of the check was entered, wasn't it.

(Testimony of Mark M. Hart.)

A. Yes.

Q. And also opposite the amount of a check would be entered the bank number?

A. If it was, I never noticed it.

Q. Now, you have heard Mr. Lotz testify that he told the Anglo Bank he had power to endorse checks made payable to Mid-States, haven't you?

A. Yes.

Q. And you have heard Mr. Smead so testify that on several occasions he told the Anglo Bank Mr. Lotz had authority to endorse checks made payable to Mid-States? A. I heard that.

Q. Now, at the time Mr. Smead was telling the Anglo Bank that Mr. Lotz had authority to endorse checks, he was your agent, wasn't he, acting under this agreement of August 22nd?

A. Did you say Mr. Smead was our agent?

Q. Yes, sir. A. Yes.

Mr. McKinnon: Pardon me. May it be stipulated, if the Court please, that the objection previously made by us to this type of testimony elicited by Mr. McCallum is subject to motion to strike on the ground it is incompetent, irrelevant and [847] immaterial?

The Court: Let the record so show.

Mr. McCallum: Q. I believe the answer to the last question was that at that time Mr. Smead was acting as your agent? A. Yes.

Mr. McCallum: I think that is all, Your Honor.

(Testimony of Mark M. Hart.)

Redirect Examination

Mr. Bronson: I would like to have Exhibit 35.

Q. Regarding this letter, excerpts of which have been wrenched from the original, if I can be forgiven the expression, and read to you by Mr. Garrison—I am referring to the letter of August 29th addressed to H. A. Will by you. Now, that is a confidential, inter-office communication between two officers, namely, the president and the treasurer?

A. Yes, sir.

Q. And its original was delivered to Mr. Garrison under an order of court requiring the production of certain records from your files, is that true?

A. Yes.

Q. Now, so that the Court may understand the context of these parts read by Mr. Garrison, I am going to entrench on your Honor's patience by reading the entire letter. It is addressed to Mr. H. A. Will, dated August 29, 1951, from Mark M. Hart.

(Thereupon, Plaintiff's Exhibit 35 was read to [848] the Court by Mr. Bronson.)

Mr. Bronson: Q. Now, you have described the nature of this correspondence with your treasurer of your company, and in reading that, is there any reference to attacking or invading premium funds of any other company, by direct reference or implication of language in your particular business?

A. No, sir.

Q. And that confidential instruction was given

(Testimony of Mark M. Hart.)

to your treasurer on August 29, 1951, just a week after you left Oakland? A. Yes, sir.

Q. How, counsel read first the paragraph which I will take the liberty of reading again. It is very brief. Preliminary to a question in explanation of it, and if need *by* you can refer to any of the preceding or following.

“At the present writing there are premiums outstanding of \$70,000 due Joe Lotz from sub-agents and applicable to policies of the American Fidelity and Casualty. I have instructed Smead to either effect collection with a reasonable time or, failing to do so, cancel the individual policies for non-payment of premium. In any event, we are assured of an additional \$70,000 credit either by cancellation or collection.”

In the first place, a cancellation is a right that the insurer [849] has under the terms of a policy at any time without cause, is that true?

A. Yes, sir.

Q. He can cancel for non-payment of premium, is that true? A. Yes.

Q. If he cancels after payment of premium and the current period of the policy, he is required to make a pro-rata return of premium, is that correct?

A. That is correct.

Q. The seventy thousand referred to there, “present writing there are premiums outstanding of seventy thousand Joe Lotz”, is that in conflict with your testimony of the assurances and your

(Testimony of Mark M. Hart.)

belief that there was one hundred forty thousand outstanding at that time?

A. No, sir, it isn't.

Q. Will you explain that to the judge, if you please?

A. Yes. Between the visit at my office in New York on August 13th and when I arrived in Oakland on August 20th, Mr. Smead had deposited or sent us \$8,000.

While we were in Oakland, while we were at Mr. Lotz' office, we picked up \$24,000 from his trustee account, making a total of \$32,000.

We also deposited \$4300, that commission item that was referred to before, which is \$36,000. We were told by Mr. Smead that \$30,000 had been deposited, which would be \$62,000. [850]

Q. Were there any credits for commission accruing at that time to Joe Lotz from your business?

A. I think there were, but I don't think they would have any bearing.

Q. All right, don't let me disturb your explanation. Go ahead.

A. And that sum total added to the seventy thousand which as of that date, August 29th, when I said approximately \$70,000 of unpaid premiums, approximately make the \$140,000 that we were told about on August 13th and again on August 20th.

Q. All right.

A. In other words, that is a net figure after taking into consideration the items I have just mentioned.

(Testimony of Mark M. Hart.)

Q. Now, you were questioned by Mr. Garrison about the conflict in your statement that Mr. Smead told you that there was \$140,000 of receivables when he was in New York—he and Mr. Lotz were in New York—and Mr. Smead's statement in this courtroom that there was seventy or seventy five thousand only there.

You made a comment in answer to one of Mr. Garrison's questions on that subject that there was one hundred forty thousand of resources, as you had every reason to believe. Will you explain what your reasons were for believing that?

A. Yes. May I refer to a wire from my office? I wired my office asking them to give me the exact figures. [851]

On August 13th when Mr. Lotz and Mr. Smead visited our office in New York only one day had elapsed since we mailed out our July account current.

The gross premiums—and this is before giving effect to return premiums—the gross premiums alone for the month of July, which I assumed were not collected as of August 13th, were \$88,704. The gross premiums applicable to June——

I am sorry, may I go back? Gross premiums applicable to August which at that time—this is August 13th—alone were \$45,000. That forty five and eighty eight made \$133,000 before taking into consideration sub-agents' commissions, which would naturally be deducted from the receivables.

The June account showed gross premiums of

(Testimony of Mark M. Hart.)

\$58,000, and since we were told that there were \$40,000 unpaid on the May premiums of \$66,000, which gross was \$71,000, it was reasonable to assume that June business was not collected.

So that totals \$191,000. Taking into consideration even a 30 per cent sub-agents' commission leaves 70 per cent of \$191,000, is \$133,700, so that when I was informed there was roughly \$140,000 of receivables I accepted it as a reasonable amount.

Q. Did you have those figures available to you at the time of the meeting? You certainly had the June, July and August?

A. I didn't have August, no, sir.

Q. But you had an estimate from Mr. Smead of what his August [852] business was running as far as American Fidelity?

A. I don't think Mr. Smead orally gave me the estimate until August 20, but I estimated the August net premiums as \$40,000 since it was just the middle of August and July had been \$80,000 in net premiums, and I worked it on that basis.

Q. And you were allowing, in reaching the figure of \$133,700, which would have to stand in place of the \$140,000, you were allowing a full 30 per cent commission on every dollar of business you wrote?

A. That's right. I was allowing the maximum.

Q. Now, as a matter of experience, do you know whether he was paying as high as 30 per cent on every dollar of business he turned over?

A. No. I learned that he was paying as high as 30 per cent, but not on every dollar.

(Testimony of Mark M. Hart.)

Q. Now, this 15 per cent prepaid commission arrangement that you refer to as the arrangement that Mid-States made for Joe Lotz some time effective around September 1st, that 15 per cent prepaid, is that on the gross premium or net premium?

A. That's on gross written premiums less gross returned premiums.

Q. Yes. But it isn't on net after taking off commissions to sub-agents, and so on?

A. No, sir.

Q. Now, I want to allude to this matter of the \$1,000 that you [853] offered to pay to Mr. Smead by a letter which you handed to him, or Mr. Feller handed to him—sealed envelope. I don't want to go anything but one aspect of it:

If on the date that you decided to cancel Lotz' agency for American Plan and to set up a course of liquidation of the account, what additional work would have to be done by any individual who, as you said, was the only person you could turn to—. Well, that was later.

But, in any event, if you put Mr. Smead there to do that, what additional labor, just briefly, would be passed upon him under that scheme, under that arrangement whereby a liquidation process was set up for the balances due to the company that had cancelled the agency arrangement?

A. Well——

Mr. Garrison: (Interposing): If the Court please, I think counsel went into that on his direct examination, and this man went into a lot of night

(Testimony of Mark M. Hart.)

work, Saturdays and Sundays, and I think it has been covered on the direct examination. I object to this as not proper redirect examination.

The Court: That may be, but, however, you can go into it briefly. I think it has been gone into.

Mr. Bronson: I asked him to go into it briefly, and it hasn't been touched on, and counsel attacked the witness on that, and that's why I asked him.

Mr. Garrison: Why, I certainly do attack him, but he has [854] already been rehabilitated as much as he can.

Mr. Bronson: Well, the Judge is going to let me have an answer, if it is all right with you.

The Witness: A. Primarily, two functions: acceleration of collections, and, failing to collect, the physical work in connection with the cancellation of the policies.

Mr. Bronson: Q. All right, supposing he was putting in an eight hour day, or whatever the office hours were over there in his routine work for Joe Lotz, and he was expected to go out and accelerate payments from the sub-agents, either during office hours or after hours—well, would that be done in office hours or after office hours, normally?

A. I think some of it could be done in office hours, but normally most of it would have had to have been done after office hours.

Q. And how much area were these sub-agents scattered around the center point of the Lotz agency?

(Testimony of Mark M. Hart.)

A. It scattered quite widely and went down as far as Santa Monica, which was a big one.

Q. And how far up north?

A. I couldn't say. I don't know the geography around here.

Q. Now, the paper work of running through the cancellation of a policy is not a simple matter is it?

A. It is a time-consuming matter.

Q. Time-consuming matter? That's all. Oh, that is what you [855] proposed to pay him for, is that right, that kind of service?

A. That is it.

Mr. Bronson: That's all.

(Short recess.)

Recross Examination

Mr. Garrison: I have one or two questions, Your Honor.

Q. I believe you said you arrived at the \$140,000 figure in a meeting in New York on August 13th by making certain assumptions?

A. Yes, sir.

Q. Those assumptions were, as I understand it, that Mr. Lotz had not collected from his sub-agents in certain months' business.

A. That's correct.

Q. Mr. Smead told you initially that the amount of monies outstanding in sub-agents' accounts in your favor was \$75,000, I believe?

A. No, in New York he said \$140,000.

(Testimony of Mark M. Hart.)

Q. Didn't he originally say seventy five, and then you reviewed it with him, and——

A. That was in Oakland, Mr. Garrison.

Q. And you went over these—In Oakland he said it was seventy five? A. That's right.

Q. And you went over these accounts as you did with us, made [856] certain assumptions, and convinced him they were one hundred forty?

A. I remember telling him the \$75,000 figure was ridiculous and it was \$140,000.

Q. And you did it on the assumption basis?

A. Yes, sir.

Q. You discounted what Mr. Smead knew they had collected prior, I take it? He knew what they had collected?

Mr. Bronson: That calls for a conclusion and we object to it.

Mr. Garrison: Q. Did he tell you that they had collected everything except \$75,000 of those premiums?

A. No, he didn't put it that way.

Q. At any rate, taking your own figure of one hundred seventy you wrote Mr. Will on August 29th that the balance was one hundred forty. I mean you wrote Mr. Will on August 29th the balance was seventy? A. Yes.

Q. And you say you arrived at that figure by the money you picked up here at Oakland of twenty four thousand plus the eight Smead had collected before you got there? A. Yes, sir.

(Testimony of Mark M. Hart.)

Q. And the \$30,000 that they were depositing about that time? A. Yes.

Q. That would be \$62,000. [857]

A. And one other item, that \$4300 item.

Q. What was that?

A. That \$4300 commission check we had deposited.

Q. Well, that hasn't anything to do with agents' balance, does it? We are talking about money owed Lotz by agents. Commission credit hasn't anything to do with that?

A. No, you are correct.

Q. Certainly. A. Yes, sir.

Q. So that you had then collected only \$62,000?

A. Yes, sir.

Q. So your \$70,000 figure was inaccurate, wasn't it, on the basis of your own figures?

A. To the extent of \$8,000.

Q. Well now, I read to you this morning from these teletype payments that had been made by Mr. Smead to you after your Oakland visit. I have computed them in the recess, and deducting eight thousand originally paid, the forty three hundred credit, down to September 15th they had paid you \$70,000, is that correct—round figures?

A. I think that's correct, without looking at that teletype.

Q. So that with the \$62,000 you got August 29th and the \$70,000 they had paid you by September 15th, all of the monies that were allowed Lotz for the account of your company had been collected?

(Testimony of Mark M. Hart.)

A. No. I beg your pardon, you said all of the monies owed Lotz for the account of our company had been collected?

Q. I will withdraw that. You had received \$140,000 by September 15th, on the basis of your own figures?

A. I think that's correct.

Q. So that from some source Mr. Lotz had gotten together \$140,000, which you say was the amount that the agents owed him for business written in your company by September 15th?

A. No, I don't say that.

Q. All right, then let's go over it again. You got \$62,000 by August 29th?

A. Yes, sir.

Q. You were paid in cash by deposit in the American Fidelity account \$70,000 between August 29th and September 15th. That is \$140,000, almost.

A. Yes.

Q. So that to restate my question: You had received through Lotz from some source or other all the monies, substantially, that you say, on your own figures, were owing Lotz by the sub-agents, isn't that correct?

A. No, it isn't; and I would like to explain.

Q. Go ahead.

A. You say that we had received all the monies that were owed to Lotz by sub-agents on our business. That is not necessarily so because I am not in a position to identify the dollars. [859] Some of that money, a large part of that money, may have been commissions that he received on Mid-States business. I can't sit here and tell you, Mr.

(Testimony of Mark M. Hart.)

Garrison, that that's all from premium collections.

Q. Well, your account with him, insofar as funds were actually due from sub-agents, was \$140,000, wasn't it? A. That's correct.

Q. So whatever he paid you over that amount he had to get from his commissions from other companies or out of his own personal funds or from loans or by the use of somebody else's premiums, didn't he? A. He had to get it, yes.

Q. That's right. And what did you mean when you teletyped him on August 17th—September 14th and said to him, "Tomorrow is the deadline with \$190,000"? A. On September 15th—?

Q. September 14th.

A. September 14th. The 15th was the deadline under the agreement.

Q. That's right. "Tomorrow is the deadline with \$190,000."

A. I meant there was \$190,000 outstanding.

Q. Sir?

A. It meant that there was a hundred and ninety thousand dollars of the original two hundred forty outstanding.

Q. That he owed you? [860] A. Yes.

Q. But not in collections that were due him from sub-agents? A. Well, yes; in part, yes.

Q. But he had paid you the one hundred forty at that point.

A. No, he couldn't have paid us the one hundred forty.

(Testimony of Mark M. Hart.)

Q. Well, you received one hundred forty, didn't you? We just computed it.

A. We are getting a little bit confused, Mr. Garrison. You say there is a teletype that shows, "Tomorrow is the deadline with \$190,000", and—
Excuse me.

Q. Go ahead.

Mr. Bronson: (Handing document to the witness.)

The Witness: Thank you.

A. Yes, my teletype says, "Tomorrow is deadline with \$190,000 unpaid". Now, that means that the original balance, there is \$190,000 unpaid to us. Of the monies that had been paid to us up to that date, I can't sit here and tell you how much of that money came out of his accounts receivable and how much came from commission earnings on Mid-States business, either Public Service or the actual Mid-States regular business.

Mr. Garrison: Q. In other words, you don't know where he got the \$140,000 that he paid you up to that point?

A. I can't tell you that offhand, no, sir, that's right.

Q. And it had to come either from your collections or your sub-agents writing for you, or his commissions or his borrowings [861] or somebody's else's premiums?

A. Come from various sources.

Q. Yes. What did he owe you in total on August 29th?

(Testimony of Mark M. Hart.)

A. I can't tell you at this moment.

Q. August 13th? A. \$240,000.

Q. If he had paid you one hundred forty and still owed you one hundred ninety, that is three hundred thirty, isn't it?

A. I didn't say it was one hundred forty.

Mr. Garrison: I think that's all.

Recross Examination

Mr. McCallum: Q. Do you recall testimony yesterday in response to some of the questions that there was a \$34,635 item representing monies that were paid to the American Plan and American Fidelity by payment directly to you in New York?

A. I remember that testimony today.

Q. Was it today? A. Yes.

Q. You do remember that those payments were made?

A. I don't remember it, only by observing them on that auditor's report.

Mr. McKinnon: Pardon me, Mr. McCallum. I would like to reiterate my objection on the grounds previously stated and have a stipulation my objection goes to all questions. [862]

The Court: So understood.

Mr. McCallum: Q. Were any part of those payments made on checks drawn on the Anglo Bank?

A. I couldn't say one way or the other.

Mr. McCallum: Thank you.

Mr. Bronson: Did you conclude?

(Testimony of Mark M. Hart.)

Mr. McCallum: Yes.

Mr. Bronson: That is all, unless you have some explanation of the last answer.

A. I don't think it is necessary.

(Witness excused.)

The Court: Call your next witness.

Mr. Bronson: At this time, we would like to read in evidence, Your Honor, the deposition of Mr. Sudekum taken in New York on October 16, 1952.

(Thereupon the deposition referred to above was read to the Court by Mr. Bronson.)

Mr. Bronson: I had contemplated, if the Court please, that the cross examination of Mr. Hart might be longer and more detailed. I arranged with two witnesses to come here tomorrow morning and they are not here now.

It is true that Mr. Marks is here, the accountant, but that is a new subject. I am going to take the onus this time of asking Your Honor's indulgence for a recess at this time as I would like to conclude with these gentlemen when they [863] come in tomorrow morning.

Mr. Garrison: I am not one to object.

The Court: Very well, we will take an adjournment until ten o'clock tomorrow morning.

Mr. Bronson: Thank you, Your Honor.

(Thereupon this cause was adjourned to May 13, 1954, Thursday, at 10:00 a.m.) [863-A]

The Clerk: Mid-States Insurance Company and Anglo-California National Bank versus American Fidelity and Casualty Company, further trial.

The Court: You may proceed, gentlemen.

Mr. McKinnon: Call Mr. Mead.

WILLIAM B. MEAD

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name, your residence and your occupation to the Court.

The Witness: William B. Mead.

Direct Examination

Mr. McKinnon: Q. Your name is William B. Mead? A. Yes.

Q. What is your residence?

A. 690 Mandana, Hayward.

Q. Your occupation?

A. Attorney at law.

Q. How long have you been an attorney at law?

A. Admitted in 1936 to the State Bar.

Q. California? [865] A. Yes.

Q. Practiced continuously ever since?

A. Yes.

Q. Were you the attorney for Joe Lotz in November and December, 1951?

A. I performed legal services for him during that period of time, yes.

Q. Are you his attorney now? A. No.

Q. How long is it since you have been his attorney?

(Testimony of William B. Mead.)

A. The early part of January, 1952, I ceased to perform any legal services for Mr. Lotz.

Q. Did you have a conversation with Mr. Hatfield, executive vice president of Mid-States Insurance Company, regarding the affairs of your client Joe Lotz on or about December 5, 1951?

A. I had numerous conversations with Mr. Hatfield in the latter part of November and early December of 1951. Do you have in mind a specific subject?

Q. Yes, I have in mind a conversation which I understand took place between you and him in reference to a statement to be procured from Mr. Lotz and Mr. Smead concerning the American Fidelity's operations.

A. Yes, I had such a conversation in my office in the Financial Center Building in the latter part of the afternoon about December 5, 1951, on that subject. [866]

Q. Any one else present?

A. No one else was present.

Q. What was said?

A. Mr. Hatfield told me that officials had talked to them indicating to him that there was a possibility Mid-States Insurance Company had grounds for a lawsuit against American Fidelity and Casualty Company. He stated that he would like to have a statement from Mr. Lotz and possibly from Mr. Smead, and that if I was their attorney at that time, he wanted me to arrange to have such a statement made.

(Testimony of William B. Mead.)

Q. What did you say?

A. My reply to him was that I certainly would have no objection to the facts, whatever they might be; however, I insisted upon having Mr. Lotz and Mr. Smead come into my office to have any statement prepared under my supervision.

Q. What then occurred?

A. I then picked up the telephone and, in Mr. Hatfield's presence, called Joe Lotz. I told Mr. Lotz Mr. Hatfield was in the office, that Mr. Hatfield wanted a statement of facts concerning the relationships of Joe Lotz and his agency with American Fidelity and Casualty and American Plan, and that he wanted Joe to come over next morning at ten o'clock and to bring Mr. Smead with him. Mr. Lotz stated he would be there at ten o'clock next morning and bring Mr. Smead.

Q. Anything further said by Mr. Hatfield? [867]

A. No. I then related my conversation to Mr. Lotz to Mr. Hatfield, and told him that next morning they would be in my office and I would prepare statements of fact concerning the subject he was interested in, and that after the statements were prepared I would communicate with him.

Q. What did he say then?

A. He said fine, and he would get in touch with me next day.

Q. Was there anything further in that conversation?

A. That is all that I recall at this time.

Q. Did Mr. Hatfield leave then?

(Testimony of William B. Mead.)

A. Yes, he left.

Q. Did they come next morning at ten o'clock?

A. No, sir.

Q. What happened?

A. Between 10:15 and 10:30 I telephoned Mr. Lotz and asked him why he didn't keep the appointment at ten o'clock. He then advised me that the night before Mr. Hatfield had stayed with him and with Mr. Smead until very late, approximately midnight, and that statements had been made that night.

And I said, "Well, where are the statements? Bring them over here right away." And he said he didn't have them. I said, "Where are they?" He said that as soon as the statements were written out Mr. Hatfield took them and left.

Q. Do you recall a conversation that took place shortly thereafter with Mr. Lotz and others relating to the statement? [868]

A. Yes.

Q. Please state where it took place and who was present?

A. As I recall, it was the next evening—or that evening, that is, the evening following the day Mr. Hatfield was in my office. There was a meeting that took place at Joe Lotz' office, in the downstairs back portion of the room.

At that meeting was Joe Lotz, Ralph Smead, Mr. Titus, Mr. Hatfield, I think Mr. Jack Lotz was in there, in and out of the area but did not participate, as I recall, in any conversations. I don't re-

(Testimony of William B. Mead.)

call specifically, but Mr. Oldberg was possibly in and out of the conversation.

Q. What was the conversation on that occasion?

A. Mr. Titus had some handwritten statements on yellow paper and stated that he wanted Joe Lotz to verify the statement. He wanted a notarial verification made of the statements.

I told him on that occasion that I was rather amazed at the fact that after reaching an agreement with Mr. Hatfield that the statements would be prepared in my office, that then I found that they were prepared in an entirely different manner. I told Mr. Titus if he wished to deliver the statements to me then and there we would then go ahead and prepare a factual statement of the subject matter desired.

Mr. Titus refused to part with the statements. I then told him I *would permit* Joe to swear to any statement that I had not gone over with him in great detail, and then Mr. [869] Titus said, "Well, if we have a lawsuit arising out of this thing I don't want Ralph Smead and Joe Lotz denying their signatures."

I said, "There's nobody going to deny their signature. But," I said, "that is the only part of the statements that I know at this time is true."

I turned to Smead and Lotz and said, "You don't deny your signature, do you?" And they said "No."

So then I told Mr. Titus that that was the extent of what would be verified at that time, and hence I used a notary's acknowledgment form which goes only to the signature.

(Testimony of William B. Mead.)

Q. I show you a ten-page handwritten document which has been introduced in evidence here as Plaintiff's Exhibit 11, and I ask you if this is the statement which was shown to you by Mr. Titus on that occasion.

A. I am looking at Plaintiff's Exhibit 11. I do not identify it by the pages other than the last page, which has the notarial acknowledgment form that has my signature and seal; and this was placed on here on December 6th by me in my notarial capacity verifying the signature only of Ralph Smead.

The balance of it, I do recall that the statement was on yellow sheets and written in pen and ink, but I did not at that time and I never have to this day read the statement or any of the statements made.

Q. Had you ever seen it prior to that occasion?

A. That was the first occasion, December 6th in the evening, at that evening meeting, that I saw the papers that purport to have the statement of the party.

Q. On that occasion were the signatures of Ralph L. Smead and Joe Lotz already on the document or not?

A. My recollection is that the signature of Ralph L. Smead was already on the document, and I asked him to state whether or not that was in fact his signature, and on the basis of that I acknowledged his signature.

Q. What happened to the statements following this conversation?

(Testimony of William B. Mead.)

A. They were never out of the possession of Mr. Titus. They were simply placed on the desk with Mr. Titus standing next to it, and in that position I placed the acknowledgment form upon it.

Q. Did Mr. Titus or anyone else take the statement away after that conference?

A. Mr. Titus proceeded to take it back in his hand and never relinquished possession in my presence.

Q. There is evidence in this case of other written statements having been made following that. Have you ever seen another written statement of either Lotz or Smead concerning this matter?

A. To my knowledge I have never read any of them. I have heard of their existence.

Q. Turning to another subject, Mr. Mead, do you recall the [871] return of Joe Lotz from Chicago some time in the summer of 1951 following a conversation between Lotz and the Mid-States executives in Chicago?

A. Yes. I don't recall the exact date, Mr. McKinnon, but I do recall the occasion.

Q. Do you recall Mr. Lotz telling you of a conversation he had with Mr. Titus in Chicago on that occasion?

A. Yes, I do.

Q. Please state what he said.

A. Mr. Lotz was very elated upon his return from Chicago. He said that the Mid-States people were certainly wonderful. He said that he had an occasion to meet Mr. Titus, and that Mr. Titus came into Mr. Hatfield's office while he, Joe Lotz, was

(Testimony of William B. Mead.)

talking with Hatfield, and that Mr. Titus shook hands with him and said, "Joe, I heard you are having a little trouble," and Joe said he told him that he was, and Titus said, "Well, we will do everything we can to help you solve your problems."

Mr. McKinnon: That is all.

Cross Examination

Mr. Garrison: Q. Mr. Mead, wasn't there a meeting in your office on one of these evenings with Mr. Hatfield and Mr. Lotz and Mr. Titus and Mr. Smead?

A. Prior to the occasion of these statements arising, there were a number of meetings in connection with the matter that [872] culminated on November 27, 1951, but Titus was not a participant in any of those.

Q. I am talking about the meetings in connection with this statement of Ralph's.

A. You mean prior to the statement——

Q. Yes. A. ——or subsequent?

Q. Prior. A. No, I recall none.

Q. Your recollection is that at the time the seal was attached you were in Joe's office?

A. Oh, very definitely in Joe's office. That is, not strictly Joe's office, but downstairs.

Q. I understand what you mean. And are you sure about Ralph's signature being on the statement when you first discussed it?

A. You mean when I first put the acknowledgment form on it?

(Testimony of William B. Mead.)

Q. No, when you first arrived and the subject was discussed.

A. When the last page of this statement was first shown to me I am certain his signature was on it because I do recall asking him if that was his signature.

Q. You don't know whether it had just been signed or whether it had been signed for some time?

A. It may have been signed just before that or earlier, I don't know. [873]

Q. Mr. Lotz had not signed his up to the time you have arrived on the scene?

He signed it in your presence, didn't he?

A. It may be, but I wouldn't be definite about whether Joe signed it. You mean referring to the signature on the margin?

Q. Yes, on this back page.

A. I don't recall specifically whether he signed it down there or whether that was already on, Mr. Garrison.

Q. Didn't Mr. Hatfield say to you on that occasion that the document had been written out by Ralph but had not been signed, waiting until you could see them—until they could see them with you and discuss it?

A. No such statement was ever made to me by anyone on that occasion.

Q. And weren't his words to that effect his explanation of having gone ahead in advance of the meeting with you on the day of the appointment?

A. There was no explanation accorded to me in

(Testimony of William B. Mead.)

in that regard. Mr. Titus was very definite that he would not give up the statement and he would hang on to it, and in spite of my protests as to the manner in which the statement was taken, it had no effect.

Q. Well——

Mr. McKinnon: Please let the witness answer, will you?

Mr. Garrison: I am sure Mr. Mead will complete his answer. [874] We won't interrupt him if he hasn't finished.

The Witness: A. The only point there, Mr. Garrison, is that Mr. Titus was very adamant that he would not permit me to have the statement and that they would stand on the statement. I do recall very distinctly saying that I had no idea whether the statement itself contained all facts or half facts or opinions or whether it was only a partial story.

Mr. Garrison: Q. You have gone all over that on direct examination. I didn't ask you about that. How does it happen that you had your notarial equipment with you over there at Mr. Lotz' office? Did you bring it along?

A. No, there was a seal over in that office. I borrowed a seal.

Q. And you had a form there, I assume?

A. There were forms in that office. I didn't have them with me, no.

Q. I see. I see. Well, you are not sure whether the writing here that Mr. Lotz put on, which reads, "I have the statement of Mr. Smead and as to

(Testimony of William B. Mead.)

all occasions when I was present it is a correct statement. Joe Lotz."

I believe you say that you are not sure whether that was written and his signature attached when you were there or not.

A. No, on that little phrase I don't have a clear recollection, Mr. Garrison. [875]

Q. Did you notice the writing there, Mr. Mead? Maybe that would bring it back to your memory.

A. It may well be that Joe did write that while I was there.

Q. I think he did.

A. I wouldn't be positive about it, but it may well be that he did.

Q. He did testify he signed it when you were present. As I understand it, the truth of the statements in here, in the statements made in the document, were never brought into question in the discussion?

Mr. Bronson: That calls for a conclusion of the witness, if the Court please.

Mr. Garrison: In the discussion.

The Court: Was there any discussion to that effect?

The Witness: A. Yes, there was, Your Honor. The discussion was between Mr. Titus and me, as I recall. Mr. Titus said, "Well, we are going to rely on the statements and prove them," and I said, "Well, I don't know whether they contain facts or whether they contain partial facts or whether they contain fabrications." The statements were not made

(Testimony of William B. Mead.)

under my supervision and I had no intention of checking into them at this point to attempt to verify or not verify.

Mr. Garrison: Q. I had reference to the truth of the statements. Mr. Lotz nor Mr. Smead indicated to you at that time in any way that the statements were not true, did they? [876]

A. I asked Mr. Lotz in the presence of the other gentlemen if he knew whether or not there were facts stated and he did say, "I have no idea really what is in it."

Q. Why would he write on the statement that the statements were true if he didn't know?

Mr. Bronson: That calls for a conclusion, Your Honor. We object to it.

Mr. Garrison: I will withdraw the question.

Mr. Garrison: Q. Let me show you Plaintiff's Exhibit 20, which is a full page statement in typed form on plain paper, and ask you if you have ever seen that or not, if you have ever seen that statement? I might further identify it by saying that is the one that was dictated and typed in my office.

A. This is the first time, Mr. Garrison, that I have seen this memorandum entered as Plaintiff's Exhibit 20, and I have never seen a copy of it either.

Q. Do you remember having a telephone conversation with me shortly before this statement was prepared, at which time I told you that I had an appointment with Mr. Lotz and Mr. Smead, and that I was going to take a statement, and invited you to come to my office and participate.

(Testimony of William B. Mead.)

A. I recall the conversation that you advert to, Mr. Garrison. I believe that you asked me, "Do you have any objection to my taking a further statement from Mr. Lotz and Mr. Smead at my office?"

My reply to you was that there had been so many statements taken under circumstances in which I had no opportunity to verify or discharge my duty to Mr. Lotz or Mr. Smead, and because I do not have any general retainer as his attorney, but am called upon from time to time to perform services for him, I wouldn't under those circumstances have any objection if you wanted to take a statement.

Q. I think that at that time you said, also, you were engaged in trial and on the particular date it wasn't convenient so far as you were concerned.

A. That is correct. From about November 15th until the end of December I had about six jury trials.

Q. I think I remember that.

A. And that is why so many night meetings were held.

Q. And we did discuss this subject on the telephone from time to time, too, after the statement was taken?

A. We didn't discuss any subject matter.

Q. Not the statement. We did have conversations from time to time.

A. We had several. I believe they were prior to that, though, Mr. Garrison.

Q. Didn't we talk after that?

A. I don't believe we talked after that until sev-

(Testimony of William B. Mead.)

eral months ago. The only other phone conversation——

Q. (Interposing) Well, what—— [878]

Mr. McKinnon: Well, wait a minute. You interrupt and we don't get the end of these answers.

Mr. Garrison: I am sorry. Mr. Mead isn't going to be intimidated by my interruptions.

Mr. McKinnon: It isn't a question of intimidation, it's a question of getting the answers.

Mr. Garrison: Oh, Mr. Mead is a lawyer. He can give his answers.

Mr. McKinnon: Well, I would like to make an interruption. I would like to interrupt and protest against counsel's interrupting the answers of the witness before the reporter has had an opportunity to record it. The record will later show what the reporter puts down, not what is in Mr. Garrison's mind. I would like to protest against these constant interruptions.

The Court: Will you——

Mr. Garrison: (Interposing) I will be very happy not to interrupt.

Mr. Garrison: Q. If you have anything further to add to any statement you are making, please say so.

The Witness: A. I think that that about covers it, substantially.

Q. I thought so. My point was, Mr. Mead, that there wasn't ever any feeling on your part that a copy of this statement that I took was not at all

(Testimony of William B. Mead.)

times available to you had it been necessary for you to have one, was there? [879]

Mr. McKinnon: That calls for his feeling. I object to that. He can ask for facts.

Mr. Garrison: I withdraw the question.

Mr. Garrison: Q. You didn't ever ask for a copy of the statement and have me decline to give you one, did you? A. No, I did not.

Q. You made reference a moment ago to your representation, and I wasn't sure whether you indicated that you were representing Mr. Smead as well as Mr. Lotz or just Mr. Lotz.

A. I was representing Mr. Lotz, and Mr. Smead only incidentally as an employee of Mr. Lotz.

Q. So that at the time of the signing of the acknowledgment by you of the signatures on the document, you were representing Mr. Lotz directly and Mr. Smead as his employee?

A. That is correct.

Mr. Garrison: That is all.

Mr. McKinnon: That is all.

(Witness excused.)

Mr. Bronson: Mr. Feller, please.

SAMUEL R. FELLER

called as a witness on behalf of the defendant herein, and being first duly sworn to tell the truth the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: State your full name and occupation to the Court.

The Witness: A. Samuel R. Feller, attorney.

Direct Examination

Mr. Bronson: Q. Where do you live?

A. Ten Park Avenue, New York City.

Q. And you stated your occupation is that of attorney? When were you admitted to practice?

A. I was admitted to practice in the courts of New York in 1928.

Q. And what relationship have you with the American Plan? A. I am its counsel.

Q. Since what time?

A. Well, since the formation of the company.

Q. When was that?

A. I don't recall the exact date. It was a number of years back. I would guess six or seven years.

Q. Now, do you work for that company on a salary or are you engaged in a private practice?

A. No, I am engaged in private practice. I am a member of the firm of Boyle, Feller and Reeves, 25 Wall Street, and I have a retainer from American Plan.

Q. Could you state, referring to the time that we are concerned with here, 1951, about how frequently would the duties that you are called upon

(Testimony of Samuel R. Feller.)

to perform as an attorney bring you to the offices of the American Plan?

A. I would say I was in the offices of the American Plan several times a week. [881]

Q. And their business is that of what?

A. They are the United States managers for—I beg your pardon, they are the managers for insurance companies, particularly in the writing of automobile physical damage.

Q. Among the companies for which they act as managers, do they have the American Fidelity and Casualty Company, one of the defendants here?

A. Yes, sir.

Q. And those operations bring your client into how many states of the Union, roughly—that is to say the American Plan?

A. It is a nation-wide operation.

Q. And speaking still of the time that I mentioned, do they operate through general agents in some states of the United States?

A. Yes, sir. [882]

Q. They had other plans of representation in other states of the Union?

A. That is right.

Q. Now, speaking now of Mr. Joseph Lotz, when did you first hear of that gentleman?

A. The first time I heard of Mr. Lotz was in 1951 in August.

Q. And did you see him at that time?

A. Yes, I did.

Q. And where did you see him?

(Testimony of Samuel R. Feller.)

A. I saw him in the offices of the American Plan, which were then located at 44 Wall Street.

Q. And what were the circumstances of your being there on that day?

A. As I recall it, I received a telephone call from Mr. Hart who asked me to come to the office to sit in on a meeting that he was having with one of his agents.

Q. Tell us who was there, please.

A. Those present at the meeting were Mr. Hart, Mr. Sudekum, Mr. Will, Mr. Lotz, Mr. Smead, and I.

Q. And Mr. Hart had been identified as president, Mr. Will as treasurer, and Mr. Sudekum as vice-president—

A. I believe he was executive vice-president at that time.

Q. —of the American Plan; that is correct, isn't it? A. Yes.

Q. Now, will you state what transpired at that meeting in the [883] way of conversations between the parties? First, I will ask you to give your estimate of the amount of time that was taken up with the meeting with these two gentlemen.

A. I believe I was there for approximately an hour and a half, but I am not absolutely certain of that.

Q. Will you relate what you can recall of the conversation?

A. As I recall the conversation, Mr. Hart asked Mr. Lotz as to what his situation was, his financial

(Testimony of Samuel R. Feller.)

situation, particularly with regard to the premiums they were owing to the American Plan.

Q. There was some money due, in other words, is that right?

A. Yes, there was some money due which hadn't been paid. I think an amount of six or seven thousand dollars, as I recall it. And Mr. Lotz explained that as a result of very rapid expansion he was strained for cash.

He went on to discuss the fact that he had in process a loan of \$100,000. There was also considerable discussion with regard to his loss ratio, discussions back and forth between Mr. Lotz and the representatives of the American Plan.

Q. Do you remember any discussion about what the amount of money was he owed, that is, on all premiums up to that time, to the American Fidelity and Casualty Company, and what resources he had, what assets he had?

A. I don't recall the exact figure, but in round figures, however, my recollection is that he owed American Plan at that [884] time, or at or about that time, something in the neighborhood of \$250,000.

As I recall it now, there was a figure mentioned of approximately \$150,000 there as the amount coming in from sub-agents. There was also reference to the loan which I have mentioned, and there was reference to the fact that he had an accumulation or would have an accumulation of commissions due

(Testimony of Samuel R. Feller.)

him from the American Plan on the business which had been written.

Q. When Mr. Lotz was mentioning this matter of having grown rapidly and being strapped, if I can use the term, for cash, about what his relationships with another company, namely, Mid-States Insurance Company, had been, and what the status of his account was, do you have any recollection of a discussion of that company at this meeting in New York?

A. Well, I think, as I recall that, that Mr. Lotz during the course of the conference I have mentioned—"What happened to some of our money," you see—and he said, as I recall it, "I have used it to pay Mid-States and to pay operating expenses."

Q. Now, you were there as, if I can suggest it, you were there as an attorney?

A. That is right, sir.

Q. You didn't have any position in the company?

A. No, I am not an official of the company.

Q. Did you have any discussion, that is, in the presence of [885] Lotz or Smead, during the discussion or at the end of it, about your views on the state of the loss account with American Fidelity and Casualty?

A. I felt, and I explained my views to those present, that I didn't see any great problem in the situation; that I felt on the basis of the discussion the matter should be worked out effectively. I may not have used that exact expression, but that was the purport of my remarks.

(Testimony of Samuel R. Feller.)

Q. Have you any recollection on the subject of the Mid-States Insurance Company and a prepaid commission plan to Lotz?

A. Yes, sir. I recall Mr. Lotz saying that he felt he would have to revise his method of operations and that he was looking for a prepaid commission, and mentioned that he believed he could obtain a deal of that kind from Mid-States Insurance Company.

Q. Now, were any documents drawn up at the time of this meeting, by you or anybody else, arising out of the meeting?

A. No, sir.

Q. Any letters written?

A. No, sir.

Q. And when you expressed your views to those present, including Lotz and Smead, that the problem that had been discussed didn't appear to be a serious one, what was the nature of—what was the final result of the meeting, then?

A. Well—

Q. Was anything done at all with respect to the problem except the discussion that you have mentioned?

A. That is right, sir. My answer is that—I am sorry—my answer is that nothing else was done.

Q. Did you see Mr. Lotz and Mr. Smead on the same day at another time or place?

A. I did.

Q. When and where was that?

A. I saw them that evening at dinner. Mr. Hart had—I was invited to have dinner with them by Mr. Hart pursuant to a telephone conversation.

(Testimony of Samuel R. Feller.)

Q. Was there any discussion of business affairs at that meeting, to your recollection?

A. To the best of my recollection, the discussion was of a social, and more particularly of a sports nature; and I think I remember quite definitely that Mr. Lotz expressed surprise that, despite the fact that my last name was the same as that of a very famous baseball player, I was not very well versed in baseball and was not a baseball fan.

Q. You learned Mr. Lotz had a background of professional baseball?

A. I gathered he was a very well known figure in the sports field.

Q. Referring, finally, on this phase of the examination to this meeting when business was discussed at the American Plan [887] office, have you any recollection of a discussion that brought in the name of a Mr. Cass?

A. I don't recall mention of his name.

Q. Have you any recollection of an incident of a telephone call put in from that office to Chicago for Mr. Lotz?

A. I have recollection that Mr. Hart used the machine, whatever it is called, the enunciator, and asked the operator to place a call for Mr. Lotz.

Q. Does your recollection serve you so far as another subject in that connection, that Mr. Hart said something to the effect that the source of that telephone call was to be concealed from the people on the other end?

A. I don't recall any reference to concealment

(Testimony of Samuel R. Feller.)

or anything hidden during the course of that meeting.

Q. Was the name of an insurance company called Public Service Insurance Company brought into that conversation?

A. I don't recall any such reference.

Q. Was there any reference to insolvency as applied to Joe Lotz in that meeting?

A. No, sir. Quite to the contrary.

Q. Or him being broke? A. No, sir.

Q. Now, when did you next see Mr. Lotz and Mr. Smead?

A. It was about a week thereafter in Oakland.

Q. In Oakland? And will you state briefly the circumstances [888] of your going to Oakland?

A. I received a telephone call from Mr. Hart while I was in the country in Connecticut, which was either Friday or Saturday, I don't recall, and Mr. Hart asked me to accompany him to Oakland. There had been an arrangement made, a tentative arrangement made for Mr. Hart and me to be in Los Angeles during that week on a wholly unconnected matter.

Q. Yesterday I made an objection to some evidence and it was sustained, and I spoke to you about it last night. A. Yes.

Q. Have you any reason to withhold in this court the statement of what that business was?

A. Not in the slightest.

Q. Well, what, briefly, were you going to Los Angeles for?

(Testimony of Samuel R. Feller.)

A. Mr. Hart and I had been working for some time prior to that particular period that you refer to with officials of a company in Los Angeles known as the Union Service Company, and the particular project was the furnishing of automobile insurance on a wholesale basis to members of unions located in and about the Los Angeles area, and we had arranged to have the conference in Los Angeles with officials of that company and their attorney.

Q. Who is their attorney?

A. Edmund W. Cook.

Q. What was the date you had for that appointment? [889]

A. I believe it was the 22nd.

Q. What day did you arrive in Oakland?

A. I believe it was the 20th, Mr. Bronson.

Q. I want to go back to another thing which slipped my mind, if I can be excused in going back to the New York date.

Mr. Bronson: I am jumping around, Your Honor, but these things come back to me.

Q. Going back to the New York meeting of the 15th of August, do you have any recollection of a statement from anybody there, specifically either Mr. Sudekum or Mr. Will or Mr. Hart or yourself, to the general effect, "What will Mid-States do if they know our position in this matter?" And a response from Mr. Hart, purported response from Mr. Hart, "We will worry about that when we get to it. All we are interested in is getting our money."

Have you any recollection of an exchange of con-

(Testimony of Samuel R. Feller.)

versation such as that? A. I have none.

Q. Coming back to Oakland again, you arrived here on the 20th? About what time of day did you get here on the 20th of August, 1951?

A. My recollection, Mr. Bronson, is that we had been delayed considerably in arriving here because of a storm, and that we got here at about noon. It might have been even later than that. [890]

Q. Who did you first see and where?

A. My recollection is on that that Mr. Hart and I met Mr. Lotz and Mr. Smead for lunch. I don't recall where. It wasn't at the hotel. It was at a restaurant in Oakland.

Q. That was, roughly, about midday on the 20th?

A. It may have been even later.

Q. What day did you leave Oakland?

A. We left Oakland two days later. I believe it was in the very early afternoon. It may have been noon time.

Q. So you had roughly about two days there?

A. Just about.

Q. And during any of the time you were there was there any audit or examination of the books and records of Joe Lotz made? A. No, sir.

Q. Did you personally look at or discuss with either Lotz or Smead the condition of the books on that occasion?

A. I don't recall whether it was discussed or not, but I remember quite distinctly and definitely, during the course of the discussions generally, mention was made by either Mr. Smead or Mr. Lotz

(Testimony of Samuel R. Feller.)

or both that their postings and other recordations of their books were considerably behind.

Q. Was any tape, that is, an ordinary adding machine tape, run off and delivered to Mr. Hart or yourself, to your recollection?

A. It wasn't delivered to me and not delivered to Mr. Hart in [891] my presence.

Q. At any time in your presence was any request made by Mr. Hart for a runoff of any figures or data?

A. I don't recall about—I am not sure of the technical term. I recall Mr. Hart asking for a breakdown as to the amounts that were owing by individual agencies.

Q. Was that delivered to Mr. Hart, to your knowledge?

A. Not in my presence.

Q. With regard to the figures that have been discussed in New York, namely, the amount owing, total amount of premiums owing by Lotz to American Fidelity and Casualty, and the receivables, that is, the receivables of Mr. Lotz, was there a discussion of that in Oakland and, if so, will you give us briefly what it developed?

A. I am quite sure, Mr. Bronson, there were discussions. I don't recall anything in the discussions that changes my recollection as to the figures I mentioned before.

Q. You mean the situation was approximately the same?

A. Substantially the same.

Q. Was there any mention made in the discus-

(Testimony of Samuel R. Feller.)

sions with Smead and Lotz on the one side and yourself and Mr. Hart on the other about Public Service business at that Oakland meeting?

A. I believe there was reference to a Public Service deal that they had worked out and that would be the source of a substantial commission income to them—to the Lotz Agency. [892]

Q. Your recollection doesn't serve to develop what the name of the company that the rewrite or deal was? I mean, was that the Public Service, do you know?

A. I thought I answered that and said that.

Q. What was the nature of that business as to the type of writing it was? Was it mentioned as a reinsurance, as a direct insurance, as a rewrite, or what?

A. I believe the term "rewrite" was used in that connection.

Q. You are familiar with that term?

A. Surely.

Q. And were that day? A. Pardon me?

Q. You were familiar that day with the expression "rewrite"? A. Yes, surely.

Q. And reinsurance? A. Yes.

Q. Do you know the difference?

A. Yes, certainly.

Q. Was a cancellation of the agency effected while you were there? A. It was.

Q. That is, the agency between American Fidelity and Casualty and Lotz.

A. Yes, it was.

(Testimony of Samuel R. Feller.)

Q. Did you have anything to do with that? [893]

A. No.

Q. Whose decision was that?

A. Mr. Hart's. It was a business decision.

Q. Do you know when it was reached?

A. My recollection is that it was reached by Mr. Hart the day before we left, which would be, I presume, the 21st.

Q. Did you take any part in an attempt to get a loan for Joe Lotz?

A. Yes, sir, I took a very active part.

Q. And did that have anything to do, so far as your knowledge of the situation, with the cancellation you just mentioned, or was it independent?

Mr. Garrison: That is objected to on the ground that Mr. Hart's decision and what motivated it——

Mr. Bronson: (Interposing): I think that's right.

Mr. Garrison: ——would be something——

Mr. Bronson (Interposing): I think that's right. Withdraw the question.

Q. In any event, what was done about securing the loan for Joe Lotz insofar as your activities were concerned?

A. Well, in the first afternoon of the first day we were there, which would be the 20th, I spent a considerable amount of time with Mr. Mead on that subject. Mr. Mead, as I understood it, had been attempting to obtain a loan for the Lotz Agency from, I believe, private sources. [894]

The next day, which was the 21st, I spent a very

(Testimony of Samuel R. Feller.)

considerable part of the day, very substantial part of the day, having a conference with various officials at the Central Bank.

Q. Did Mr. Hart take part in that with you or was that yourself alone?

A. Well, Mr. Hart was there during a substantial part of the time.

Q. Were there legal questions involved in the loan discussions?

A. Yes, there were several legal questions.

Q. Mention some of them.

A. The primary problem that I was attempting to solve was the desire of the Central Bank to have a document executed by the American Fidelity and Casualty Company covering the earnings, future earnings of the Lotz Agency on business which had been written, and the bank was concerned with what would happen if cancellations ensued and how firm a commitment after the collateral could be made by the agency.

And there were numerous drafts and documents which I drew up in an attempt to prepare something which would be satisfactory to their counsel as well as the loan committee, and I had conferences with at least three or four different people and possibly more.

Q. And there were come tentative drafts of documents drawn up? A. Oh, yes. [895]

Q. Did you get any decision from the bank, either approving or disapproving a loan to Joe Lotz? A. No, we did not.

(Testimony of Samuel R. Feller.)

Q. They neither approved it or disapproved it?

A. No.

Q. They just didn't act on it, is that what you are saying?

A. My recollection is that they said it would have to be referred to a committee.

Q. What was the amount of the loan under discussion?

A. My recollection is that it was \$50,000.

Q. That took up most of your day?

A. A good part of it, yes.

Q. Now, were any documents of the legal nature drawn by you during your stay in Oakland?

A. There were two documents drawn which are among the exhibits in this case.

Q. No. 1 is what?

A. No, 1 is the agreement with Joe Lotz dated the 22nd, and the second is the letter addressed to Ralph Smead which is erroneously dated the 17th.

Q. The cancellation which is an exhibit here, a letter addressed to either American Plan or American Fidelity by Joe Lotz, was that also prepared by you?

A. I am not sure whether it was prepared by me or whether it was prepared by Mr. Hart, but in any event, I looked it over [896] before it was put in final form.

Q. So in effect there were three documents that were prepared there in connection with the visit of you and Mr. Hart? A. Yes, sir.

Q. And to go over them again, there was the

(Testimony of Samuel R. Feller.)

agreement of August 22nd, the two-page type-written agreement, a letter addressed to Mr. Smead which refers to the sum of \$1,000—am I right in that? A. Yes.

Q. —and, third, a cancellation notice.

A. That is right.

Q. Referring to the agreement and the letter to Mr. Smead, who prepared those? A. I did.

Q. And when and where did you prepare them, and how?

A. Those two documents to which you have made reference, Mr. Bronson, were prepared by me on the night of the 21st at the Leamington Hotel, and I wrote it out on hotel stationery—I wrote them out in longhand on hotel stationery, as I recall it.

Q. Then they were subsequently typed, were they? A. They were.

Q. When and where was that done?

A. Those documents were typed at the Central Bank in Oakland.

Q. On what day? A. On the 22nd. [897]

Q. And subsequently the letter of Mr. Smead, according to the testimony here, was placed in an envelope, sealed and handed to Mr. Smead, is that correct? A. That is right.

Q. And the other document, the agreement, was typed and according to the testimony here was signed by the parties whose signatures appear on the second page, and I am asking you how many copies of that were prepared and where were the copies left?

(Testimony of Samuel R. Feller.)

A. I don't recall the exact number of copies that were prepared. There were a number of copies prepared, and a copy of the document, the agreement with Joe Lotz dated the 22nd, was left with Mr. Smith at the Central Bank.

I don't know whether I mentioned in response to your question, Mr. Bronson, that the typing of these documents was done at the Central Bank by a secretary furnished by Mr. Smith in his office or in the office of the bank. That is where the documents were typed, and my recollection is that they were signed there.

Q. Were Lotz and Smead there during any part of that morning?

A. Yes, sir, they came over.

Q. Where were the signatures placed on the document? At the bank?

A. At the bank. That is my best recollection.

Q. And did that conclude the services you performed for your [898] client at Oakland, or were there any others? A. No, that is all.

Q. Then you stated you left some time roughly around noon time of that day?

A. That is right.

Mr. Bronson: That is all.

Cross Examination

Mr. Garrison: Q. Mr. Feller—

A. Yes, sir?

Q. —you referred to the cancellation of the Lotz Agency by Mr. Hart as being a business deci-

(Testimony of Samuel R. Feller.)

sion. I take it that you make that distinction because you furnished the legal services as distinguished from business services?

A. That is right.

Q. And your practice is a general practice?

A. It is.

Q. This meeting in New York lasted how long?

A. My recollection is that, as I said before, the meeting lasted approximately an hour and a half. It may have been a little more, it may have been a little less.

Q. And a lot of back and forth discussion?

A. Quite a bit.

Q. Between principally, I imagine, Hart and Smead?

A. Hart, Smead and Lotz, I would say. [899]

Q. Did Mr. Hart tell you any reason why he needed his lawyer there at that meeting on that occasion?

A. You mean at the dinner meeting?

Q. No, at the office.

A. My recollection is, Mr. Garrison, when he called me he said, "I would like—", as I said before, without being overly repetitious—"I would like you to sit in on a meeting that I am having with an agent." He might have said, "It is a collection problem", it is entirely possible.

Q. I assume it isn't normal for you to sit in on meetings with all their agents when they come to town?

A. No, sir, of course not.

Q. The discussions that went back and forth

(Testimony of Samuel R. Feller.)

between Smead and Hart regarding balances and volume and loss ratios and rewrites in other companies, and so forth, those were not legal problems? Those were insurance underwriting problems?

A. Quite so.

Mr. Bronson: He hasn't said there were any discussions of rewrites in other companies, and that part of the question assumes a fact not in evidence, and we ask that it be stricken.

Mr. Garrison: I will strike out the word "rewrite". I mean insurance or reinsurance, and so on.

Q. So that that wouldn't be something that you would participate in particularly?

A. It would be something I——? [900]

Q. That discussion, that phase of the discussion, wouldn't be something that you——

A. (Interposing) That is right, yes.

Q. Yes. You were there in the event specific legal problems arose? A. Precisely.

Q. And you are not purporting to say to this Court that you can recall all of the conversation that occurred between those people in that office?

A. I have given by best recollection, Mr. Garrison.

Q. And the question is that you don't purport to say that you recall all the conversation that occurred there?

A. I certainly don't purport to recall every word that was uttered in 1915.

Q. Certainly not. Certainly not. Don't you remember, however, at that meeting that Mr. Hart

(Testimony of Samuel R. Feller.)

told Mr. Lotz that he better not write any more business for American Fidelity?

A. I do not recall that, sir.

Q. Didn't he say something about he was going to suspend his writing business for American Fidelity? A. No, sir.

Q. Well now, when you looked this letter over of August 22nd, which I understand you to say you believe Mr. Hart prepared—Mr. Hart said he did prepare it—what did you think Mr. Hart meant in that letter when he said, "Pursuant to my discussion [901] with your Mr. Hart in New York we are cancelling your contract"?

Mr. Bronson: Do you want him to guess what Mr. Hart meant when he dictated the letter?

Mr. Garrison: He looked the letter over and passed on it, he says, and I wondered if in looking it over and passing on it, it brought anything back to his mind about the New York discussions.

The Court: Does that refresh your memory in relation to any matter you testified to?

A. Well, it does refresh my recollection, Your Honor, to this extent: that, as the first sentence goes on to say, "and particularly in pursuance to my discussion with your Mr. Hart, and particularly in view of your inability to comply with my request for a prepaid commission", it seems to me it would have a very definite reference to the discussion there, Mr. Garrison.

Mr. Garrison: Q. Yes, that is my point. That doesn't—

(Testimony of Samuel R. Feller.)

A. (Interposing) A discussion with regard to the inability to meet his request.

Q. And cancellation of his contract.

A. I beg your pardon?

Q. And the cancellation of his contract?

A. No, sir, it doesn't say that at all.

Q. Well, it says, "Pursuant to our discussion", and, "We are cancelling your contract"?

A. "And particularly in view of your inability to comply with [902] my request." Perfectly apparent what that clause means.

Q. That is your interpretation?

A. Yes, it is, sir.

Q. You say that in your presence you didn't observe anyone handing Mr. Hart a tape showing a column of figures representing the balances due those companies?

A. That is my testimony, yes, sir.

Q. And you didn't see anyone hand Mr. Hart tapes showing accounts receivable from agents?

A. No, sir.

Q. Well, you work in Oakland two days, you say? A. Yes.

Q. And for almost all of one day you were at the bank? A. That is right.

Q. And where were you on the second day?

A. Well, the second day we were over at the bank as well having these documents prepared.

Q. Were you in Lotz' office the first day?

A. I was there the first day, yes, sir.

Q. But you weren't on the second?

(Testimony of Samuel R. Feller.)

A. If I was, it wasn't for very long.

Q. I see. You don't recall Mr. Hart asking for any figures as to the amount of premiums written and the balance of receivables in the Lotz Agency?

A. No, sir. [903]

Q. And your purpose in going out there was to determine what the facts were with respect to Lotz' records, wasn't it?

A. I don't believe so. That wasn't my purpose. I don't believe that was the purpose in having me go out there. I think I was asked to go out there primarily in connection with this loan situation.

Q. Didn't Mr. Hart say to you he was concerned about Mr. Lotz' affairs?

A. I believe he told me the collections hadn't developed as had been indicated in the oral meetings, and that they had run into a problem with respect to the loan.

Q. He told you that Smead had only been able to collect \$8,000?

A. I don't recall Mr. Hart mentioning any specific figures to me.

Q. You heard in the New York meeting Lotz owed your company roughly \$250,000?

A. That was my recollection.

Q. Didn't you hear discussion that he owed Mid-States thirty thousand?

A. No, I don't recall that.

Q. And owed other miscellaneous companies thirty thousand?

A. I don't recall.

(Testimony of Samuel R. Feller.)

Q. Is it your testimony you don't recall discussion about what Lotz owed other people?

A. I have given the best of my recollection. [904]

Q. And you don't recall any reference to Lotz' obligations to others? A. No, sir.

Mr. Garrison: That is all.

The Court: Take a recess.

(Short recess.)

(Witness excused.)

Mr. McKinnon: Call Mr. Marks, please.

ALFRED R. MARKS

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: State your full name and your occupation to the Court.

The Witness: My name is Alfred R. Marks. I am a certified public accountant.

Mr. McKinnon: If the Court please, in interrogating this witness I am going to refer to and offer in evidence certain schedules in the order in which these I have in my hand appear. If Your Honor would like, I would be happy to hand these up to Your Honor as copies for Your Honor's reference while we go through the examination. [905]

And may I say, if the Court please, in fairness to Counsel and for their convenience, that I would be happy to permit an interval between the discussion—between direct and cross examination to enable their accountant to examine the schedules

(Testimony of Alfred R. Marks.)

and confer with counsel prior to the time they have to cross examine this witness.

Direct Examination

Mr. McKinnon: Q. Your name, please?

A. My name is Alfred R. Marks.

Q. Where do you reside?

A. I reside in Malverne, New York.

Q. Your occupation?

A. I am a certified public accountant.

Q. How long have you been a certified public accountant?

A. I was certified by the State of New York in April, 1932.

Q. Please describe your career since that time, the commissions you have held, and so on?

A. Since 1932?

Mr. Garrison: We will stipulate to his qualifications. He is a certified public accountant.

Mr. McKinnon: I would like him briefly, nevertheless, to review his career.

The Witness: Since 1929 I have been in public accounting continuously except for two intervals of about one year each at which time I was an executive of a corporation, and during [906] that period I started as a junior accountant and went through and became a partner of my own firm.

Mr. McKinnon: Q. What is that firm?

A. Ferro Berdon and Company.

Q. Where are they located?

A. 39 Broadway in New York.

(Testimony of Alfred R. Marks.)

Q. You are a partner in the firm?

A. Yes, I have been a partner in the firm since 1947.

Q. Have you had a special experience in insurance accounting?

A. Yes, almost from the inception of my connection with Ferro Berdon. I have had a great deal of extensive experience in insurance accounting from the viewpoints of companies, agency brokerage firms, and so on.

Q. Have you examined the books of Mid-States Insurance Company in reference to the Lotz Agency?

A. Yes. An examination was made under my supervision at the home office of Mid-States Insurance Company in Chicago, with specific reference only to the account of the Joe Lotz Agency.

Q. Well, what aspect of the books did you examine?

A. I examined the—the examination was conducted primarily to substantiate the figures contained in the claim prepared by the attorneys for Mid-States, a claim against American Fidelity and American Plan, and in connection with the [907] examination I examined the agency account maintained in the books of that Company with Joseph Lotz, and examined to some degree supporting information to satisfy ourselves with respect to the entries contained in such account.

Q. Did you also examine the books of the Joe Lotz Agency?

(Testimony of Alfred R. Marks.)

A. Yes. An examination was made under my supervision of such books of the Joe Lotz Insurance Agency as were made available to us. They started with the date of June 1st, 1949, and they went—I believe it was posted through November, 1951.

Q. Were there other books prior to June, 1949?

A. We could determine none. In the course of my examination I made an inquiry from Joe Lotz' former accountant, a Mr. Green, in Oakland, to determine whether there were any books which I should see, and he stated to me that it was his recollection that there were no sets of general books that normally would be found in an agency for the period prior to 1949.

Q. Have you also examined the report of Lester, Herrick & Herrick, dated January 21st, 1953, which I believe is in evidence here?

A. I—yes, I have made a review of that report.

Q. Now, Mr. Marks——

Mr. McKinnon: I am referring, Your Honor and Gentlemen, to the two-page schedule entitled "Schedule 2."

Mr. McKinnon: Q. I will ask you, Mr. Marks, if you at my request made a comparison of the cash position of the [908] Joe Lotz Agency vs. Premiums payable to companies from May, 1949, to December 1950? A. Yes, I have.

Q. I will show you the two-page document I have referred to, which is entitled "Comparison of Cash Position versus Premiums Payable to Com-

(Testimony of Alfred R. Marks.)

panies", and in the upper right-hand corner, "Schedule 2, Page 1.", and then there is a Page 2.

I show you that document and ask you if that was prepared by you or under your supervision?

A. It was.

Mr. Garrison: Your Honor, we will object to the use of any figures dealing with the periods 1949 and 1950 on the ground that they are totally incompetent, irrelevant and immaterial to any issues in this case.

This refers to our previous discussion on the same subject, Your Honor. This litigation involves a charge of fraud committed in the year 1951, by a Company who only did business with Mr. Lotz in that year, at a time when we were operating under a contract that was entered into September of that year.

It is our contention and the basis of my present objection that what might have been done prior to 1951, can't possibly shed any light upon whether or not Mr. Hart and his associates committed acts in 1951, at a time when we were operating under the contract, which constituted fraud, and [909] particularly whether or not they received premium funds which were owned and belonged to Mid-States Insurance Company on business written in 1951.

Mr. McKinnon: Will Your Honor hear my response to the objection?

The response is simply that, as we have indicated before, one of the defenses which we offer

(Testimony of Alfred R. Marks.)

in this case is that the fund, the monies in the so-called trust account, represented actual dealer obligations from Lotz to the Company; and that to establish that, we offer evidence showing a course of dealing which discloses that there was invasion, including 1951, of the funds of the Mid-States Insurance Company by this agent, which invasion of course would be inconsistent with a trust relationship.

Your Honor will recall that there has been testimony here which has been submitted, I believe, most of it, without objection, relating to the so-called float that was going back to the inception of the Agency of Joe Lotz with Mid-States, to the effect that he was using funds, premium monies, of the companys to pay sub-agents' commissions and operating expenses. This schedule tends to confirm—it does confirm the invasion by Lotz of Mid-States money for the period which I have described. It is therefore a part of the course of dealing and is a part of our defense, which is one of the major defenses in this entire litigation. If this evidence were [910] excluded, the Court would deprive itself of facts and figures taken from the books which confirm the oral testimony that has been introduced.

Mr. Garrison: Your Honor, I do not desire to belabor the objection, but I would like to make this one short observation to further explain our position:

The theory of this litigation is, quite aside from the question of the character of the funds involved,

(Testimony of Alfred R. Marks.)

and quite aside from whether or not there was or was not a dealer-creditor relation, that Mr. Lotz was an agent. And as our District Court of Appeals says, it is Hornbook Law that an agent has certain obligations to his principal. Among those are fair dealing and fair disclosure and honesty.

In this case it is our contention that Mr. Lotz violated that agency obligation. He did not treat us fairly. He did not make a full disclosure or a fair description.

I think it is fundamental, elementary law that whenever anyone else joins with an agent in his breach of his obligations, that person, whether he profits or whether he does not profit, becomes likewise liable for any damages that result from the agent's dereliction.

So that our contention in this litigation is that it makes no difference whatever whether the funds, or relationship of debtor creditor, or fiduciary, or trust fund, the fact is what the relations are. He had the agent's obligations [911] to treat it as I have mentioned, and if anyone else participates with him in the breach, they, like he, become responsible.

Mr. McKinnon: If Your Honor please, Mr. Garrison is now arguing the case. I am perfectly prepared to respond to a legal argument at this time, if Your Honor wishes. But Mr. Garrison is saying that these were trust funds, and this is conspiracy, and that is the end of the case.

That's fine for the plaintiff's presentation, but it

(Testimony of Alfred R. Marks.)

completely eliminates our position in this matter; which is, according to the cases we cited in our trial memorandum, this: that when an agent is permitted to use funds which would otherwise be trust funds, for his own purposes, in the manner in which this agent did here, the obligations because changed from trustee and debtor.

This evidence bears directly on that point. Mr. Garrison would simply exclude all the evidence tending to support our defense.

The Court: The objection is overruled.

Mr. Garrison: May the same objection go to the other offers dealing with the same period?

The Court: It may.

Mr. Garrison: And may it go in subject to motion to strike?

The Court: You may have a running objection and motion to strike. [912]

Mr. Garrison: Thank you.

Mr. McKinnon: I offer this document in evidence.

(Whereupon, document entitled "Schedule 2," was admitted into evidence and marked as Defendant's Exhibit J.)

Mr. McKinnon: Q. Now, Mr. Marks, showing you this Defendant's Exhibit J, I will ask you to explain the significance of it to His Honor, if you will. I would ask you to limit your comments to three or four items rather than going through them all. Let's take May, 1949—June, 1949, and any

(Testimony of Alfred R. Marks.)

months subsequent thereto, and add your explanatory comments, will you, please.

A. Yes, sir.

This Schedule is one which purports to show a comparison of the cash position of the Joe Lotz Agency at the end of each of the months during the period from May, 1949, through December 1950, comparing such figures with the amount of liabilities that the Joe Lotz Agency had to the companies it represented as at the same dates.

In other words, the second column of this schedule shows an amount of cash available, including operating and petty cash.

In other words, all cash of the Agency.

The first column shows only the amount of trustee account cash included in the second column. [913]

The third column shows the amount of the premiums payable to all companies as reflected by the general ledger of the Joe Lotz Agency.

The next column, "Deficiency of Cash", shows the amount, or shows the extent to which there was insufficient cash from all sources to equal or balance the amount of premiums payable to the companies represented by the Joe Lotz Agency at the end of each of the months.

The remaining columns here show the amount of the Mid-States balance alone included in the third column; in other words, the amount of the amount due Mid-States which is included in the column labelled "Premiums Payable to All Companies".

Q. Mr. Marks, if we take that first month, the

(Testimony of Alfred R. Marks.)

first line, May, 1949, shows \$24,554.64 as the total cash. The next column, third column from the left, shows total premiums payable \$25,942.51.

The first column shows that as of that month there was a deficiency of cash of \$1,387.87 in the Lotz Agency to compare with the total premiums payable, is that correct?

A. That is correct.

Q. In the second line, June, 1949, it shows on the contrary that there was an excess of cash, as noted by the parenthetical figure in the first column, of \$6,863.13, is that correct?

A. That is correct.

Q. As we go down the line, we see that the figures—none of [914] the remaining figures are in brackets. Therefore, as I understand it, there was a deficiency of cash in the amount mentioned in the first column, beginning with August, 1949 and running down to December, 1950, in the amounts shown, is that correct?

A. That is correct.

Q. In other words, if you go to the second page, you see that that deficiency had reached a figure as high as \$40,554.36 in November, 1950; and in the last item \$28,362.15 in December of 1950?

Then from this schedule, Mr. Marks, can you say that in only one month in the period of May, 1949 to December, 1950 was there enough cash in the Joe Lotz Agency to pay the premiums to all companies?

A. At the end of each of the months contained

(Testimony of Alfred R. Marks.)

in this schedule there is only one month in which there was a sufficient amount of cash to equal the liabilities to the companies.

Q. Very well. Now, Mr. Marks, there has been testimony in this trial concerning the question of whether or not Mr. Lotz was current in his payments of premiums to the companies.

Since that term "current" has been given various meanings, one of those meanings, in the opinion of Mr. Hatfield, being synonymous with "delinquent", I believe the term "delinquent" and I will ask the question whether the records show that Mr. Lotz from the beginning of his agency with Mid-States, or at [915] least from July, 1947, down to November, 1951, remitted his premiums to Mid-States on time, on the due dates, or not? Did you make such an examination?

A. In connection with our examination of the records of Mid-States' dealings with the Lotz Agency, and from information contained in the agency account, contained in the Mid-States books, dealing with the Lotz Agency, we made a comparison with the dates settlements were received as compared with the requirements under the contract.

Q. Very well. Now, I show you Schedule 3, one page, "Joe Lotz Agency, Beginning of Premium Payments to Mid-States (per Mid-States records) Schedule 3, and I ask if that schedule was prepared by you? A. Yes, it was.

Mr. McKinnon: I offer this in evidence, Your Honor.

(Testimony of Alfred R. Marks.)

The Court: It may be admitted next in order.

(Whereupon document, Schedule 3 above, was received in evidence and marked Defendant's Exhibit K.)

Mr. McKinnon: Q. Now, Mr. Marks, will you kindly explain the schedule in brief to his Honor?

A. This schedule breaks down the period covered into three categories, measuring by the credit period contained in the contracts in force during the period. In other words, from May, 1947, until April, 1951, the agency operated under an agreement with Mid-States providing that settlement must be made [916] within twenty-five days after the end of the month in which the business was written.

On May 1st, 1951, the contract was changed to increase the credit period from twenty-five days to seventy-five days. Then on September 1, 1951, a new contract was entered into which provided for a sixty-day credit period.

Now, extending from the left to the right hand side of the page, this schedule shows a classification of the number of settlements paid within certain categories, and I have broken it down to show in the first column those accounts which were paid within five days after the date they were due, and those which were paid from six to thirty days late, those which were paid thirty to sixty days late, those paid over sixty days late, and the accounts which were unpaid.

(Testimony of Alfred R. Marks.)

You will note as you follow down the page, Your Honor, that under the twenty-five day credit period the first settlement of the May, 1947, account would be due in July, 1947. And from July to December, 1947, a period of six months, every account was paid within five days after the due date.

In the year 1948, of the twelve monthly payments three payments were made within five days after the due date, nine payments were paid some six to thirty days late.

In the year 1949, of the twelve months, five were paid within five days after the due date, seven were paid from six to thirty days late. [917]

For the year 1950, no payments were made within five days after the due date. Three payments were made within sixty days late—correction, three payments were made within six to thirty days late. Nine payments were made thirty to sixty days late.

From January to April of 1951, a period of four months remaining under the first contract, of the four payments, three were paid thirty to sixty days late and one was paid over sixty days late.

At that point the contract changed to a seventy-five day credit period, and on the basis of such new terms it operated only under that contract for a period of four months. During that period of four months two payments were made within five days after the due date, one was paid six to thirty days late, one was paid thirty to sixty days late.

(Testimony of Alfred R. Marks.)

Under the new contract which called for—effective September 1st, 1951, which called for a sixty-day credit period, no settlements were actually made under such contract.

Q. Now, another point in issue in this case, a point on which there has been testimony, is the rate of loss ratio of the Mid-States business written through the Joe Lotz Agency from September 1, 1951 and onward and later, compared with the loss ratio prior to September 1, 1951.

I will ask you if you prepared a schedule of loss ratio on this business from September 1, 1951, through December 31, [918] 1953? Please, just answer whether you did. A. Yes, I did.

Q. Now, I show you a one page document entitled, "Joe Lotz Agency, Cumulative Totals of Earned Premiums and Loss Ratio on Mid-States Business, September 1, 1951, through December 31st, 1953", and also entitled "Schedule 6", and I will ask you if that was prepared by you?

A. Yes, it was.

Mr. McKinnon: I offer this in evidence, if the Court please.

The Court: It may be admitted and marked next in order.

(Whereupon document, Schedule 6, above, was received in evidence and marked Defendant's Exhibit L.)

Mr. McKinnon: Q. Now, Mr. Marks, I will leave it to you to explain this schedule to his Honor.

(Testimony of Alfred R. Marks.)

Mr. Garrison: Just a moment before you go on. Was Schedule 6 taken from Lotz' books?

Mr. McKinnon: Q. Mr. Marks, Mr. Garrison has asked from which books these were taken, Mid-States or Lotz?

A. They were taken from information obtained from Mid-States books.

Mr. Garrison: Thank you.

The Witness: A. Furnished by the Mid-States people.

Mr. McKinnon: Q. Now, if you will kindly contract your explanation to something less than the schedule and figures and [919] get to the essence, I am sure his Honor and all will be indebted to you.

A. This schedule shows monthly results of the operation of the business of the Joe Lotz Agency with Mid-States Insurance Company. It is a columnar schedule showing statistics as follows:

Earned Premiums for the month and on a cumulative basis. Commissions earned by Lotz on a monthly and cumulative basis. The percentage of commissions to earned premiums for each month and on a cumulative basis.

Amount of losses and adjustments incurred in each month and on a cumulative basis. And the percentage of losses and adjustments incurred to earned premiums on a monthly and cumulative basis.

And also another figure for each month under operation of the new agreement, which went into effect on September 1st, 1951, but is a combined

(Testimony of Alfred R. Marks.)

schedule of the results of the operations on the run-off on the old contract as well as on the new contract.

The earned premiums, Your Honor, are the portion of the premiums that, on a pro rated basis, are earned in a particular month. It is measured by a formula, for the most part, prescribed by insurance regulations.

The losses and loss adjustments incurred are on the basis of losses actually reported to the company as having been [920] incurred during that particular period.

This schedule shows with respect to the loss ratio that for the period from September 1951, through December 31st, 1953, which just about exhausted the unearned premium reserve, and at this point outstanding losses had been reduced to, I think, eight or nine cases, for this period the loss ratio was 71.08 per cent on both contracts, excluding the month of September, 1930, on the old contract.

Q. 1930?

A. I mean 1951. September, 1951, on the old contract. The loss ratio for that period is 68.51%

Q. Now, did you also make a computation of the loss ratio of Mid-States under the Joe Lotz Agency for the period January 1, 1951, through August 31, 1951?

A. Yes, I have.

Q. I show you a one page document entitled, "Joe Lotz Agency, Cumulative Totals of Earned Premiums and Loss Ratios on Mid-States Business, January 1, 1951, through August 31st, 1951", and

(Testimony of Alfred R. Marks.)

also entitled, "Schedule 7", and ask you if you prepared that schedule? A. Yes, I did.

Mr. McKinnon: I offer this in evidence, if the Court please.

The Court: It may be admitted and marked.

(Whereupon document, Schedule 7, above, was received in evidence and marked Defendant's Exhibit M.) [921]

Mr. McKinnon: Q. Now, before explaining this to his Honor I will ask you again to refer to the period—Well, it acts as of the close of each month, doesn't it, Mr. Marks?

A. That is right.

Q. January 31st—

A. I see your point.

Q. It runs from January 1, 1951, through August 31 of the same year? A. That is right.

Q. The period having been chosen because that's the period, approximately, in which Mr. Lotz acted as the agent for both Mid-States and American Fidelity, correct? A. That's right.

Q. With that, will you kindly explain that schedule, briefly, to his Honor?

A. This schedule contains information again prepared from basic information furnished from Mid-States from their Chicago records, and the form and substance are the same as in Schedule 6, or the previous exhibit, and covers the period from January 1, 1951, through August 31, 1951.

It shows the information by the month contained

(Testimony of Alfred R. Marks.)

in that period—for the months contained in that period, and on a cumulative basis.

The loss ratio for the period on a cumulative basis, was 64.65% [922]

Q. If I calculated correctly, then, it is true to say, then, that the loss ratio for the period from September 1, 1951, and onward was only 3.86 higher than the loss ratio for the months of January to August, 1951, is that right?

A. That's right.

Q. I will now ask you if you computed the loss ratio of American Fidelity on its business written through the Lotz Agency from December, 1950, to February, 1954? A. Yes, I have.

Q. I show you a schedule entitled, "Joe Lotz Agency, Cumulative Totals of Earned Premiums and Loss Ratios on American Fidelity business, December, 1950 to February, 1954, Schedule 8", and I will ask you if you prepared that schedule?

A. Yes, I did.

Mr. McKinnon: I offer this in evidence, if the Court please.

The Court: It may be admitted and marked.

(Whereupon document, Schedule 8, above, was received in evidence and marked Defendant's Exhibit N.)

Mr. McKinnon: Q. Will you please give a brief summary or explanation of this schedule to the Court?

A. This schedule shows information similar to that commented upon and described in the previous

(Testimony of Alfred R. Marks.)

two exhibits, but it is related to the business of the Joe Lotz Agency written on behalf of American Fidelity and Casualty Company, and was based upon [923] information contained in American Plan Corporation records.

The setup of this schedule, is identical with the schedules previously commented on for Mid-States business, and shows in the same form for the months contained in the period from December, 1950, which was the inception of the business written by Lotz for American Fidelity, through the period February, 1954, at which time the last transactions on the American Fidelity business had run off.

It shows that for that period the loss ratio on the business was 79.51%.

Q. Now, earlier in the trial, I believe at the outset, Mr. Marks, we indicated to his Honor—I think in our trial memorandum—that the loss ratio of American Fidelity was around 100%. That was erroneous?

A. That was erroneous.

Q. Is that right? A. Yes.

Q. In other words, a recapitulation—or re-computation of business has brought out your figure of seventy-nine and a fraction?

A. That is right.

Q. Rather than 100%?

A. That is right.

Q. We were in error in our first estimate. I believe one of the reasons was, was it not, that the computation hadn't been [924] brought down to date, shows there as of an earlier figure?

(Testimony of Alfred R. Marks.)

A. That is right.

Q. Which probably explains it.

Mr. McKinnon: Now, if the Court please, I come to the schedule in your hand, which is called Schedule 9, which I have to beg the Court's indulgence on a little bit, because this has a little complication in it, and I hope it won't be too tedious.

Mr. McKinnon: Q. I asked you, did I not, Mr. Marks, to prepare a schedule containing essentially the following:

First, the net premium funds collected by Lotz on the American Fidelity policies after commissions to sub-agents had been subtracted;

Secondly, to compute his total income from commissions, or all other sources, and whether cash or credit.

By the way, I should have said for the period December, 1950, to November, 1951, with reference to both of those items.

Thirdly, for the same period, to compute the fair allocation, what you would be prepared to say and demonstrate is a fair allocation of the operating expenses of the Lotz Agency for that period to the American Fidelity operations;

And, finally, to compute the funds remitted by the Lotz Agency to the American Fidelity during that period of time;

The object, expressed rather generally, being to compare the total of the premium and other income monies that he had— [925] pardon me—premium monies on American Fidelity policies and Lotz'

(Testimony of Alfred R. Marks.)

other income from all sources, less the operating expenses attributable to American Fidelity, with the amount remitted to American Fidelity during the period.

Do you recall my asking you to make those computations? A. Yes.

Q. Did you do so? A. Yes, I did.

Q. I show you a document titled, "Joe Lotz Agency, Computation of Funds Exclusive of Mid-States Premiums Available for Settlement of Account with American Fidelity and Casualty Company, December, 1950, to November, 1951, Schedule 9", pages 1, 2 and 3; and I believe page 1 contains the data in summary, and pages 2 and 3 are supplemental sheets supporting certain data on page 1, is that correct? A. That is correct.

Mr. McKinnon: And let me say for counsel's purposes that the accountant has prepared the figures as asked and we will not quarrel with any of the titles of any of the columns. We will ask the accountant to give us the explanation of these figures and the legal argument that will follow therefrom will, I am sure, be submitted by you. I don't want to require the accountant to be a lawyer as well as a member of his own profession.

Mr. McKinnon: Q. Now, Mr. Marks, is this sheet that I [926] have just described prepared by you? A. Yes, it is.

Mr. McKinnon: I offer this in evidence, if the Court please.

(Testimony of Alfred R. Marks.)

The Court: It may be admitted and marked next in order.

(Whereupon document, Schedule 9, above, was received in evidence and marked Defendant's Exhibit O.)

Mr. McKinnon: Q. Now, Mr. Marks, will you give a summary, an explanation, of this schedule to his Honor? I believe you can confine your comments to page 1, because the other two pages are actually supplemental documents.

The first column is entitled, "Net Premium Funds Collected by Lotz on A. F. and C. policies After Commissions to Sub-Agents".

I take it that that means that you subtracted from the gross premium the amount of the sub-agent's commissions, and you set forth in column 1 the net remittance of the premium after that subtraction, is that correct?

A. Well, that subtraction, actually, of the commission was done by the sub-agents in remitting to the Joe Lotz Agency, and therefore, he remitted the gross premiums less the amount of the sub-agent's commissions, so that the net check received by the Joe Lotz Agency represented the actual cash received to be deposited in this trustee account.

Q. I see.

A. And the figures contained in the first column are the [927] summary and tabulation of such remittances by the agents.

(Testimony of Alfred R. Marks.)

Q. And they total for the period indicated \$225,-914.00?

A. That is right. Now, I would like to make clear, Mr. McKinnon, that this information was based upon information contained in the report prepared on the Lotz Agency account for the December, 1950 period through November, 1951, by Lester, Herrick & Herrick, public accountants, whose services were employed by Mid-States, and that the figures contained in here are reconcilable to those figures contained in that report. We have not made an independent examination of the figures.

Q. Does that comment apply to the entire schedule or only to column 1?

A. It applies, wherever possible to wherever the figures could be reconciled with the Lester, Herrick & Herrick report, and such reconciliations are footnoted on the bottom of the schedule.

Q. I see. Going to the second column, which is entitled "Commissions and Other Income from all Sources, Cash or Credit", and it totals for the period \$111,133.00. Please explain that?

A. This is a tabulation which is supported—the column on page 1 is supported by page 2 of this schedule, which shows the detail used to reconcile these figures. And just a quick reference to page 2 of this schedule will show that the amount of \$111,-133.00 contained in the second column on page 1 consists of or comprises commissions earned by the Joe Lotz Agency from [928] Mid-States Insurance Company, all of which were paid in cash to Joe

(Testimony of Alfred R. Marks.)

Lotz during the period December, 1950, to November, 1951, totalling \$54,955.00.

And it includes, also, commissions from American Fidelity and Casualty totalling \$30,032.00, of which \$8,036.00 was actually received in cash by the Joe Lotz Agency from American Fidelity and Casualty Company, and \$22,006.00 was credited to Joe Lotz' account with the American Fidelity and Casualty Company in reduction of the amounts due from Joe Lotz.

Other items included in the total of \$111,133.00 includes commissions received by cash or by credit from other companies, companies represented by Joe Lotz other than Mid-States or American Fidelity, totalling \$21,028.00, and cash—income cash from miscellaneous sources, including some life insurance commissions, and so on, of \$5,106.00, and the total is \$111,133.00.

Q. When credits occurred, I suppose the credits were made to the trustee account of Lotz, is that correct?

A. That is right.

Q. Now, your third column is entitled, "Total Funds Available to Cover American Fidelity and Casualty Company Operations Cumulative". Will you explain that briefly, please?

A. Yes. This column is a total of the opening balance in the preceding month, which would be reflected in the fifth column of this schedule, plus the first two columns, to show the amount [929] of

(Testimony of Alfred R. Marks.)

funds carried forward from the preceding month, plus the premium funds collected by Lotz on the A. F. and C. policies, plus commissions and other income from all sources.

Q. Now, explain the first column, please, regarding operating expenses?

A. The first column reflects the monthly total of the portion of the operating expenses and drawings made by Joe Lotz, which we believe are properly and fairly allocable to the American Fidelity and Casualty Company operations performed by Joe Lotz.

This first column is supported by analysis of the schedule contained on page 3 of schedule 9. And the amount, the total amount of the portion of the operating expenses and drawings allocable to the A. F. and C. operations of the Joe Lotz Agency are \$47,669.00.

A quick reference to schedule 9, page 3, shows the method used by us to allocate the total operating expenses and the drawings of Joe Lotz between the operations of Mid-States, American Fidelity and Casualty Company, and other companies.

Q. Why did you take cash volume for the first three or four months and the number of transactions for the remaining months?

A. There was a change in the bookkeeping methods of the Joe Lotz Agency effective April, 1951, when the agency was placed on a machine accounting basis in April, 1951.

(Testimony of Alfred R. Marks.)

From that point on they could—they did maintain records [930] on bookkeeping machines, which enabled us to determine the number of transactions entered into in each of the months.

Mr. McKinnon: I believe his Honor would like to interrupt now. Is that your desire, Your Honor?

The Court: Is it agreeable to you, counsel?

Mr. Garrison: Very agreeable, Your Honor.

The Court: Recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [931]

ALFRED R. MARKS

called as a witness for the defendants, having been previously sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as hereinafter indicated:

Direct Examination—(Continued)

Mr. McKinnon: Q. Just before the noon recess, Mr. Marks you had reached the point in reference to Schedule 9 which summarizes in the column third from the last the cumulative amount of the premiums and commissions, less operating expenses by month in the Lotz Agency, referring for the purpose of this exhibit to American Fidelity and Casualty Company business, and you were about to conclude your explanation by reference to the last two columns.

(Testimony of Alfred R. Marks.)

Will you now proceed? You can start with the column next but last, if you wish.

A. Oh, I see.

Q. What does that represent?

A. The column, second from the last, on page 1 of Schedule 9 shows the amount of monies remitted to American Fidelity and Casualty Company by Lotz' and by Lotz' sub-agents, and the remittances of the amounts that were reflected either in Lotz' books or which went to the American Fidelity and Casualty Company, [932] bypassing Lotz' books, to the extent of about \$34,000.00.

Q. And the last column?

A. The last column shows an accumulation of the monthly balances progressively from December, 1950, down to November, 1951.

Q. Then, if I may summarize—listen, will you, and see if this is correct:

The net premiums on American Fidelity business, after deducting commissions to sub-agents, total for the period \$225,914.00. Total income, whether from commissions or otherwise, and whether cash or credit for the period total \$113,133.00.

A. \$111,000.

Q. Pardon me, \$111,133.00. If we add those two figures together they make \$337,047.00. If you subtract from that the operating expenses which you allocate to American Fidelity and Casualty Company of \$47,669.00, you get a remittance of \$289,378.00. And that is \$23,467.00 more than was re-

(Testimony of Alfred R. Marks.)

mitted to the American Fidelity and Casualty Company on its business.

A. That is right.

Q. Now, I have one more schedule.

Mr. McKinnon: I say, Your Honor, I have one more schedule which I would like to show to the witness.

Mr. McKinnon: Q. We asked you to compute, Mr. Marks, the state of the Lotz Agency account with the American Fidelity [933] and Casualty Company as of the latest date, March 31st, 1954, the purpose being to show whether or not he had overpaid American Fidelity.

For that purpose I show you a document called "American Fidelity and Casualty Company account with Joe Lotz Agency, Statement of Account January 1, 1951, to March 31, 1954", and entitled "Schedule 12", and containing pages 2 and 3, the first page of which has been removed because we found it irrelevant to our purposes, and I ask you if you prepared those two sheets?

A. Yes, I did.

Mr. McKinnon: Thank you. I offer this Schedule in evidence, if the Court please.

The Court: It may be admitted and marked next in order.

(Whereupon document, Schedule 12, above, was received in evidence and marked Defendant's Exhibit P.)

(Testimony of Alfred R. Marks.)

Mr. McKinnon: Q. Will you please explain that schedule to the Court, Mr. Marks?

A. This page 2 of schedule 12 is the accounting for premiums written by the Joe Lotz Agency with the American Fidelity and Casualty Company for the period January 1, 1951 through March 31, 1954.

It breaks the account into two segments, the first segment being for the period January 1, 1951, to October 31, 1951, at which point the account was balanced by the cancellations of [934] \$61,000.00—balanced approximately—and from November 1, 1951, to March 31, 1954, showing subsequent cancellations and cash payments made on account of such cancellations.

The net of all the transactions referred to in this schedule show a balance in favor of American Fidelity and Casualty Company for premiums as of March 31, 1954, in the amount of \$840.50.

The second page of this schedule shows details of the net cash disbursed by American Fidelity and Casualty Company for the account of Joe Lotz during the secondary period referred to.

Q. Now, Mr. Marks, I wish you very briefly to summarize the schedule and I will ask you if this summarization is correct:

First, that from May, 1949, to December, 1950, there was in every month except one month a deficiency of cash in the Lotz Agency in comparison with the amounts of premiums owing to all companies; the deficiency running from \$1,387.00 in

(Testimony of Alfred R. Marks.)

May, 1949 to as high as \$40,554.00 in November, 1950.

Mr. Garrison: If the Court please——

Mr. McKinnon: Just a moment, until I finish the question. You may make your objection when I finish the question, please.

Mr. McKinnon: Q. (Continued) Thus showing that there must have been—is that right, Mr. Marks? —That there must have been an invasion of the premiums of these companies during the period mentioned, by Mr. Lotz for operations of [935] sub-agents, or other persons?

Mr. Garrison: If the Court please, Mr. Marks has told us what the exhibits show. The exhibit speaks for itself and it seems to me an argument at this point by counsel is unnecessary, and the questions have all been asked and answered, and if there is any further clarification, I think Mr. Marks should do it and not counsel.

The Court: Could you break down that question so I follow you?

Mr. McKinnon: Your Honor, if you would like me to reframe it, I will make it more brief, if the Court please.

Mr. McKinnon: Q. Is this a correct summarization of Schedule 2, Mr. Marks: That in every month except one from May, 1949 to December, 1950, there was a deficiency of cash in the Lotz Agency in comparison with the amount of Premiums payable to all companies?

(Testimony of Alfred R. Marks.)

Mr. Garrison: Objected to on the ground that it has been asked and answered, and the exhibit speaks for itself.

The Court: The objection will be overruled.

A. Except for the month of June, 1949, the other months, month ends, show a deficiency of cash.

Mr. McKinnon: Q. Well, can one draw the conclusion from that the premium monies of these companies in the Lotz Agency have been invaded by Mr. Lotz?

A. I think that is a fair conclusion. [936]

Q. Now, with reference to the period within which he paid his premiums to companies, is it a fair summary of Schedule 3 to say that there is no case, no money in the entire period from July, 1947, to the end of the period covered by the schedule, in which he made his payment on the due date?

Mr. Garrison: Objected to on the ground that it has been asked and answered. The witness gave us this discussion of this exhibit in considerable detail, and it is now repetitious and argumentative, for the purpose of rehashing the same testimony on the same exhibit.

Mr. McKinnon: My purpose, if the Court please, is to try to reduce the complexity of these figures into a portrait that can be put in four or five questions. It seems to me it is more manageable to summarize them in this way. I, naturally, leave it to Your Honor's pleasure.

(Testimony of Alfred R. Marks.)

The Court: The objection will be overruled. You may use the same latitude in cross examination.

The Witness: May I please have a repetition of that question?

Mr. McKinnon: Q. I will repeat the question, then: Does not Schedule 3, prepared by you, not show that none of the payments due from the Lotz Agency to Mid-States during the period mentioned was made on the date specified in the contract?

A. Except for the first column where the date of receipt was within the five day period of the due date, all other months, [937] all other accounts, were to some degree late.

Q. Very well. And that in 1948 in nine months they were six to thirty days late; in 1949, in seven months he was six to thirty days late; and in 1950 in nine months he was thirty to sixty days late, is that correct?

A. That is correct.

Q. Is it a fair statement to say that the loss ratio on the business of Mid-States in the Lotz Agency on September 1st and following—1951, of course—was 68.51%, and that prior thereto it was 64.65%, a difference of only 3.86% after September 1, compared with before?

A. That is right.

Q. And is it a fair statement to say that the loss ratio on the American Fidelity business was 79.51% from the beginning to the end?

(Testimony of Alfred R. Marks.)

A. From December, 1950, to the end of the run-off in February, 1954.

Mr. McKinnon: And I will not now labor the Court with summarizing schedule 9, which we have just covered, which shows that the total payments to American Fidelity and Casualty Company were less than the premiums of American Fidelity and Casualty Company, and there was income from all sources, after taking away the operating expense applicable to the American Fidelity Company.

Mr. McKinnon: Q. Finally, there is a present balance due from Lotz to American Fidelity of \$840.50? [938] A. That is right.

Mr. McKinnon: Now, I have only a very few more figures, Your Honor, in my re-computations.

Mr. McKinnon: Q. Mr. Marks, have you computed the percentage of sub-agents' commissions to Mid-States and American Fidelity business from January 1, 1951 to November 31, 1951?

A. Did you say American Fidelity?

Q. Well, first let's take Mid-States business.

A. Oh.

Q. Percentage of sub-agents' commissions in Mid-States business for that period in the Lotz Agency.

A. Percentage of commissions allowed to sub-agents during the eleven months ended November 30, 1951, on account of Mid-States business was approximately 26%.

(Testimony of Alfred R. Marks.)

Q. And in the American Fidelity?

A. In the American Fidelity for the same period, approximately 23%.

Q. And on all companies?

A. And on all companies represented, approximately 26.7%.

Q. And have you the percentage of operating expenses to the business of all companies from January to August, 1951?

A. For the period from January to August, 1951, the percentage of operating expenses and drawings by Joe Lotz against writings of premiums was 15.4%. [939]

Q. The total of sub-agents' commissions and operating expenses, then, amounts to 42.1% on all companies, do they not? A. That is right.

Q. I think Mr. Lotz had two bank accounts, did he not, Mr. Marks?

A. Well, he had two types of accounts, a trustee account and an operating account.

Q. What went into the trustee account? What type of money? I don't mean how.

A. The type of money that went into the trustee account were premiums collected from sub-agents, salvage and subrogation, transfers from the operating account, miscellaneous items, and I guess that just about generally covers it.

Q. When premiums went into that account,

(Testimony of Alfred R. Marks.)

would they go in less sub-agents commissions or with sub-agents commissions?

A. I would say that in substantially all cases the agent deducted the commission for the amount he remitted to the company, and therefore the amount that they would deposit in the trustee account would be the amount net of the commission.

Q. In some cases was it a gross premium?

A. In some cases there was a gross premium.

Q. In that case what did he do?

A. In that case he would have to draw a check on his trustee account to pay the commission to the broker.

Q. For what other purpose would he draw on the trustee account? [940]

A. Well, he drew on the trustee account to make payments on account of his obligations to the companies he represented. He made premium refunds to the sub-agents and/or assured, and he made transfers to the operating account.

Q. For what purpose would he draw on the operating account, what type of transaction?

A. From the operating account he would draw—he would draw on the operating account to cover his normal operating expenses and to cover his drawings and living and personal expenses, and also out of that account he would make, when necessary, transfers to the trustee account, back to the trustee account.

Q. He would transfer from the operating ac-

(Testimony of Alfred R. Marks.)

count back into the trustee account, is that right?

A. That is correct.

Q. How were his earned commissions handled?

A. Earned commissions were usually deposited in the operating account.

Q. Did he ever place any of his own capital in the agency, so far as you can say?

A. Well, from during—bearing in mind that the only business available to us goes back to 1949, I would say from that period, from 1949 to date, there were some borrowings that he made and the proceeds of which he put into his fund. Some of those went into the operating account, some into the trustee account. He also made repayments out of his funds in settlement of such [941] obligations.

Q. Now, you say some of his commissions were paid by check and by credit, is that correct?

A. Commissions he received?

Q. Commissions he received from the companies he represented. How did he receive them, go back to that?

A. Well, he would get monthly settlements from the companies he represented in most cases, and they would be in the form of a check which would be deposited in his income account.

However, there were certain periods when the companies did not remit the commissions to him and used those commissions as a reduction of the amount of liability that he owed to the company, and it would therefore be credited against his account.

(Testimony of Alfred R. Marks.)

Q. Trustee account?

A. Well, of course, on their books it would be an account to the agent, which would be the trustee account, the account for trustee funds.

Q. Now, in view of the status of these accounts as you have described them, could one distinguish at any time what money in the trustee account belonged to what company and what money belonged to another?

A. No, it would be impossible to determine or segregate the balance in the trustee account as to how much was in there to the credit of each company.

Q. Now, yesterday, when Mr. Garrison was interrogating Mr. Hart [942] he produced a tape of some payments totalling \$144,698.00, which appeared to have been paid on account of the roughly \$240,000.00 owing to the American Fidelity by September 14th, the date of a teletype in which Mr. Hart was demanding \$190,000.00 roughly as the balance of the payment due him.

The total of one hundred forty and one hundred ninety would be three hundred thirty thousand, and there was obviously a problem there because the total amount due American Fidelity was only about \$240,000.00.

Mr. Garrison: If the court please, counsel is now suggesting to Mr. Marks the answer that he seems to seek.

Mr. McKinnon: Very well.

Mr. Garrison: And the same difficulty Mr. Bron-

(Testimony of Alfred R. Marks.)

son suggested with me earlier is now my problem with Mr. McKinnon.

Mr. McKinnon: Very well, I will reframe the question.

Mr. McKinnon: Q. On September 14, Mr. Hart sent a teletype, I believe, according to the evidence, demanding the payment of the balance of some \$190,000.00. Can you reconcile that teletype with the existing facts or not? Answer yes or no so we can proceed with great strictness here.

A. Yes, but I would like to make an explanation on it.

Q. If Mr. Garrison doesn't object, it is all right with me.

Mr. Garrison: Go ahead.

The Witness: A. I made an analysis of the amounts that were received by American Fidelity and Casualty Company by way [943] of credit to the bank account maintained in the Central Bank in Oakland for the period from August 21st down to September 14th, and my tabulations of the entries in that account showed that during that period \$59,000.00 was actually deposited in the account up to that point.

The \$59,000.00, roughly \$60,000.00, deducted from the \$240,000.00 figure you have mentioned, would leave roughly \$180,000.00.

Mr. McKinnon: Q. Very well. Now, have you a balance sheet of the Lotz Agency as of November 30th, 1950, adjusted to reflect equity in unearned premium reserve?

(Testimony of Alfred R. Marks.)

A. I have a balance that was prepared from the books without examination, without audit, but after having given effect to certain obvious adjustments, and giving effect of equity—to the inclusion of equity in unearned premium reserve carried on behalf of Lotz by companies whom Lotz represented.

Q. Will you let me see that a moment, please? This is in the form of a work sheet prepared by you, is it?

A. That is right.

Mr. McKinnon: We have no copies of this up to this time. We are going to offer it in evidence. (Handing document to Mr. Garrison.)

Mr. Garrison: Do I understand this is the balance sheet of the Lotz Agency as of November 30, 1950?

Mr. McKinnon: Q. Is that correct? [944]

A. I believe so.

Mr. McKinnon: That is what I thought it was. It says November 30, 1950.

The Witness: That is right, November 30, 1950.

Mr. Garrison: Well, we will object to the balance sheet of November 30, 1950, on the ground that it is for a period which hasn't anything to do with this case because the issues involved in this case arise as a result of acts of 1951. Whatever might have been the condition of Lotz' affairs in November, 1950, seem to me to be outside the issues.

Mr. McKinnon: It is a part, Your Honor, of a presentation of two balance sheets, one as of this date, which is the month in which Lotz became

(Testimony of Alfred R. Marks.)

agent for American Fidelity, and the second, which I am going to come to in a moment, which is one year later, after the termination of his agency with us and after his liquidation with us.

The Court: I will allow it to go in subject to motion to strike.

Mr. McKinnon: I offer this in evidence.

The Court: It may be admitted and marked.

(Whereupon document entitled Joe Lotz Insurance Agency, Balance Sheet, November 30, 1950", was received in evidence and marked Defendant's Exhibit Q.)

Mr. McKinnon: Q. Have you prepared a similar balance sheet as of November 30, 1951? [945]

A. I haven't prepared a balance sheet as of November 30, 1951, but—I don't know whether this has been—is a copy of a balance sheet. This is a copy of a balance sheet prepared by Lester, Herrick & Herrick, auditors in this matter for Mid-States, as of November 30, 1951, and except for certain adjustments to reflect equity in unearned premium reserves and other minor adjustments, I think it fairly reflects the condition presented by the books as of November 30, 1951. But I don't know whether this had been admitted as an exhibit.

Q. You don't know whether it is in the big report of January, 1953, of Herrick & Herrick?

A. Well, this is a report of Lester, Herrick & Herrick dated April 8, 1952.

(Testimony of Alfred R. Marks.)

Mr. McKinnon: Pardon me one second, Your Honor, and I think we can finish.

Mr. McKinnon: Q. Well, Mr. Horton was not sure whether that balance sheet you are looking at—

A. (Interposing) May I suggest, could I see the report that has been admitted as an exhibit?

Q. Here is a copy of it.

A. No, this is not the report that I am referring to. There is another report issued by Lester, Herrick & Herrick under date April 8, 1952, containing a balance sheet of the Joe Lotz doing business as Joe Lotz Insurance Broker and General Agent, as at November 30, 1951, and July 31st, 1951. [946]

Q. Well, our object, Mr. Marks, is to get from you and get into evidence a balance sheet as of November 30, 1951, using the Lester, Herrick & Herrick figures with adjustments you have mentioned.

Now, any convenient method that you can suggest will be satisfactory I am sure to his Honor and to Mr. Garrison.

A. I suggest that this balance sheet be put into evidence, and then take the schedules that I have prepared reflecting adjustments.

Q. Very well, I propose to do it that way. Shall we tear that out of that sheet? We don't want to put in the whole thing. This document is more than a balance sheet.

A. That is the report.

The Court: Do you want to lay a foundation for this document? What do you wish to do before he

(Testimony of Alfred R. Marks.)

tears that sheet out of there? Any objection?

Mr. McKinnon: I am sorry to present a problem, Your Honor, but this arose just before the noon hour and this is an item on which we are not fully prepared.

Mr. Garrison: We have no objection to any balance sheet dealing with the year 1951, the year in question, and if we can among ourselves find a balance sheet that reflects the conditions we won't make any point of it.

Why don't you let the subject rest for the moment and we will work it out? [947-8]

Mr. McKinnon: The left-hand being assets and the right-hand being liabilities.

(Whereupon the document referred to above was marked Defendant's Exhibit R for Identification.)

The Court: There is a representative of Herick's here. Does he identify this document?

Mr. Garrison: I believe he said he wasn't quite sure just what it meant. I thought we could do it at recess.

The Court: Maybe he knows now.

(Defendant's Exhibit R for Identification shown to Mr. Horton.)

Mr. Garrison: Yes, he says it is a copy of his report.

The Court: Very well.

(Witness excused.)

Mr. Kakures: Call Mr. Mead.

Mr. Garrison: Do I understand that the defendant rests?

Mr. Bronson: I haven't had an opportunity to announce it. Except for the cross-examination of the last witness, the defendants American Plan and American Fidelity and Casualty Company rest, Your Honor.

The Court: Are you in a position to go forward and examine the witness now?

Mr. Garrison: No. Mr. McKinnon suggested very courteously earlier that in view of the voluminous exhibit presented today, he had no objection if we cross-examined after [949] we digest the exhibit, which we hope will be tomorrow morning.

Mr. Bronson: We are resting subject to any further examination developed by the cross-examination.

Mr. Kakures: On behalf of the defendant Joe Lotz, Your Honor, I would like to have Mr. Mead take the stand.

Mr. Garrison: I would like Your Honor to understand that we started the first half this morning.

The Clerk: William B. Mead to the stand, previously sworn.

WILLIAM B. MEAD

a witness recalled on behalf of the defendants herein being previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as hereinafter indicated:

(Testimony of William B. Mead.)

Cross Examination

Mr. Kakures: Q. Mr. Mead, you testified this morning that from time to time you acted as attorney for Joseph Lotz Insurance Agency, is that correct?

A. That is correct.

Q. Recalling your attention now to the date of November 27, 1951, do you recall anything specific dealing with the Joe Lotz Agency on that date?

A. Yes, I do.

Q. What was that? [950]

A. November 27, 1951, was the occasion when certain documents were executed by Joseph Lotz in connection with an agreement with the Mid-States Insurance Company.

Q. And how did that come about, Mr. Mead?

A. Well, negotiations had been conducted for a number of days prior to November 27th, principally with Mr. Gerald Hatfield, a vice-president of Mid-States, and with Mid-States—or rather with one of Mid-States' Chicago attorneys, a Mr. Frank Czar, and also on some occasions with Mr. Carl Oldberg and Mr. George Kledzik. Those negotiations were concerned with the problem of Joe Lotz' indebtedness to Mid-States Insurance Company, and extensive discussions were held with the object of finding the best and most practical solution of the problem.

Q. In other words, as you resolved the problem, Mr. Mead, so far as Mid-States' problem was concerned, it was whether they were to keep Joe in business or stop him from business, is that correct?

(Testimony of William B. Mead.)

Mr. Garrison: I think that should be stricken out as a voluntary statement by counsel, because it would be impossible for any of us to know what motivated Mid-States Insurance Company at that time, and I think the question should relate to Mr. Mead's conversation on it.

Mr. Kakures: I will withdraw it, Counsel.

Mr. Kakures: Q. Did you talk with Mr. Hatfield in [951] relation to this problem?

A. Yes, I did.

Q. Could you tell us the context of that conversation with Mr. Hatfield?

A. I can give you the substance of it. I doubt that I could recall it word for word.

Mr. Garrison: Is this November 27th?

The Witness: This is prior. November 27th culminated a number of days of discussion.

Mr. Garrison: Let's have the time and place and parties present.

The Witness: The first occasion that I met Gerald Hatfield and Frank Czar was in my office. Mr. Lotz was also present. I don't recall on that first occasion whether Carl Oldberg was present or not.

The Court: Fix the date, as near as you remember it.

The Witness: As near as I remember it, it must have been four or five days prior to November 27th, Your Honor.

(Testimony of William B. Mead.)

On that first occasion, after introductions had been made, Mr. Hatfield asked a number of questions concerning what the situation was of the Lotz Agency and what if any solutions we had to suggest.

On that first occasion, I stated that I didn't know the exact amount of the indebtedness of Joe Lotz to Mid-States. However, I had some information that indicated that he was [952] in debt to Mid-States in the neighborhood of a couple of hundred thousand dollars, and that for some time past after or some time prior, that I had been attempting to work out a program for Mr. Lotz whereby he could overcome certain management difficulties that were being—that were bringing about certain losses. This we referred to in the conversation as the so-called "target plan."

I stated that I had understood from information gathered from Lotz and Mr. Smead, and also an accountant that Lotz had, that his overhead was running in the neighborhood of fourteen percent; that advance commissions to agents were running from twenty to thirty-two percent; that the loss ratio had been somewhat higher than it should have been, higher than the average loss ratio of California companies writing similar business; that in setting up the target plan that arbitrarily allocated ten percent to profit, eight percent to overhead and an arbitrary fifty percent to loss ratio, that it was the object and design in that target plan to reverse

(Testimony of William B. Mead.)

the agents' or sub-agents' commissions so that rather than being advance commissions, to make their commissions depend upon the loss ratio so that the sub-agent would receive his money dependent upon the actual experience with his account, so that therefore if the sub-agents' account had a fifty percent loss ratio, he would get the difference between the fifty percent and the difference remaining after fourteen percent to the company, ten percent arbitrary profit, and eight percent of overhead, which I believe, if my mental arithmetic is right, would pay an agent eighteen percent commission under those circumstances. In any event, the agents' loss ratio should be forty percent and he might conceivably get as much as twenty percent commission.

Mr. Hatfield discussed all the points in connection with that and agreed that that represented a form of solution to the overall problem.

Then another subject that was discussed was what amounts of money were owed to other companies besides Mid-States. Based upon information I had gotten from Mr. Lotz, I stated to Mr. Hatfield and Mr. Czar that, to the best of my knowledge, the outstanding accounts with other companies would not exceed four or five thousand dollars.

Then we discussed what would happen in the event that Mid-States Insurance Company should file a law suit against Joe Lotz or should attempt to proceed in bankruptcy. I told both Mr. Czar and Mr. Hatfield that in my opinion if either of those

(Testimony of William B. Mead.)

proceedings were undertaken, that it was highly unlikely that very much could be recovered for the benefit of Mid-States or any other small creditors that might be there; that I personally felt that the soundest solution to the problem that was confronting all the people concerned was to [954] continue to operate the agency, but to correct certain lax management practices, namely, the payment of advance commissions; secondly, that the overhead was too high, in terms of the volume of business being written, and that by more rigid and careful supervision of claims that savings would be forthcoming in the Loss Department which should result in getting more nearly average loss ratio.

Mr. Kakures: Q. And was it your understanding that Mr. Hatfield went along with this so-called plan of yours?

Mr. Garrison: I object to that on the ground that it calls for a conclusion, I think.

The Court: Yes.

Mr. Kakures: Withdraw that.

Mr. Kakures: Q. Did Mr. Hatfield state to you that he thought that under this plan the business could become solvent in from twelve to twenty-four months?

Mr. Garrison: I think, if the Court please, Counsel ought not to lead the witness, as I mentioned before, and should ask his questions without suggesting the answers.

Mr. Kakures: Q. What was Mr. Hatfield's response to this plan?

(Testimony of William B. Mead.)

A. On the first occasion that we met, he offered very little comment upon the proposal. He stated that he and Mr. Czar were looking into the entire matter and would attempt to determine, first of all, what all the facts might be, and then [955] would continue to meet with me and Mr. Lotz until they had reached a conclusion on precisely what they should do.

Q. And that conclusion would be whether they would make more credit available to Joe Lotz or not?

A. That was one alternative.

Q. Then in this meeting at the Hotel Leamington on November 27, 1951, Mr. Mead, were certain papers executed that day?

A. Yes. That happened to be an evening meeting, incidentally, we met at—I don't recall the room number, but in the hotel room of the Hotel Leamington. Mr. Hatfield was present, Joe Lotz was present, Mr. Frank Czar was present, Mr. Oldberg was present, and I was present. I don't recall whether Mr. Kledzig was present at that meeting or not, but I believe he was. On that occasion——

Mr. Garrison: What was the date?

The Witness: November 27th.

On that occasion certain documents were executed by Joe Lotz only. The first one that was—Well, I don't recall the exact order, but one of the documents that was executed by Mr. Lotz was in a letter form that we referred to in the meeting as a "letter of intention."

That letter of intention was not dictated by me.

(Testimony of William B. Mead.)

It was dictated in large part by Mr. Hatfield and Mr. Czar.

In that letter there were recited certain facts and certain intentions of Mr. Joe Lotz, mainly such things as the [956] hiring of George Kledzig.

Then there was another document executed by Joe Lotz, and that was a general assignment. That document is an exact copy of the general assignment form of the General Finance Company that was insisted upon by Mr. Oldberg.

Another document was the assignment of a specific fund in the hands of American Fidelity and Casualty Company, meaning the credit account of Joe Lotz.

There was also a discussion on that occasion, and the same subject matter was covered in a meeting a day or so before. I had requested that Mid-States sign a definite statement of what they would do in connection with the Lotz Agency. It was stated that they would not sign a document because under similar circumstances in their prior history they had joined in a formal document of participation in the operation of an insurance agency, and that subsequently the agency had failed and Mid-States was held liable to the other creditors of the agency for having assumed the agency position. Therefore, they didn't wish to have anything appear on the record as to any participation in the operation of the agency, but to remain solely as a creditor on the record.

Orally, however, Mr. Hatfield and Mr. Czar and

(Testimony of William B. Mead.)

Mr. Oldberg agreed that if Joe would execute the documents on October 27, 1951, that he could continue to write policies [957] of Mid-States Insurance Company, and that if management practices were put into effect such as described in the so-called target plan, that they were of the opinion, both Mr. Hatfield and Mr. Czar, that within a period of twelve months and certainly not to exceed twenty-four months time, the Joe Lotz Agency would be completely in the black.

Mr. Kakures: Q. In other words, at that time, Mr. Mead, as Joseph Lotz' attorney, you wanted some additional guarantee from Mid-States that if your client executed those documents, that he would have some protection, is that correct?

Mr. Garrison: That is objected to, if the Court please, on the ground the question is what was said and done and not what Mr. Mead wanted; calling for a conclusion, and hearsay.

Mr. Kakures: Well, Your Honor, I am trying to get the attorney of Joe Lotz at that time to explain his idea about this whole transaction.

The Court: Develop the facts, whatever they may be.

Mr. Kakures: Q. Before your client signed those documents, Mr. Mead, did you have any discussion on what part Mid-States would play in this so-called target plan?

A. Yes. Mid-States, through the voices of Hatfield and Czar, agreed that Joe would be—that is, the Joe Lotz Agency would be enabled to continue

(Testimony of William B. Mead.)

writing policies of insurance issued by Mid-States Insurance Company; that they would continue to keep the Agency going, provided that the [958] power were given to an official of Mid-States, George Kledzig by name, to act as general manager of the Agency, and that he be put on the payroll of the Agency; that so long as Joe lived up to the declaration of intention in the letter of October 27th, 1951, that nothing would be done by Mid-States to disturb it.

Q. So it was then——

A. (Interposing) Excuse me. It was the contention, however, that subsequently upon an audit of the books it were found that there was greater indebtedness to other companies than the four to five thousand dollars that was stated as being owed to other companies at that time, or if the so-called target plan did not work out over a reasonable period of time—six months or thereabouts—that Mid-States would have a free hand then to reappraise their position and take what action might at that time be advised.

Q. So it was with this understanding on your part that you allowed your client to execute these documents, is that correct, Mr. Mead?

A. That is the only consideration upon which the documents were executed at that time.

Q. A few days later was there another meeting held in relation to this matter, Mr. Mead?

A. Some two weeks later, around the fourteenth

(Testimony of William B. Mead.)

or fifteenth of December, there was a further meeting held. [959]

Q. And where was that meeting held?

A. That meeting was held in the Shell Oil Building in San Francisco, in Mr. Garrison's office.

Q. Who was present there?

A. Mr. Garrison, Mr. Carl Oldberg, Vice-President of Mid-States; Mr. Joe Lotz and myself.

Q. And what was the purpose of that conference?

A. That conference was requested by Mr. Oldberg for the purpose of having Joe Lotz grant to Mid-States further and more particular management powers over the Joe Lotz Agency.

Q. And that request was made upon you, of course, as the attorney for Joe Lotz?

A. That was requested in the meeting in Mr. Garrison's office.

Q. What was your reply to that?

A. I stated at that time to all those present that I had heard some statements previously to the effect that Mid-Sates was contemplating bringing a lawsuit, and that it was my then position, and had been all along, that the only result of a lawsuit would be the ruination of Joe Lotz, and that if it were a fact that a lawsuit was to be filed, then I would advise Mr. Lotz to grant no further concessions to Mid-States but we would take whatever position we were in and face the lawsuit from that position.

Q. And did Mr. Garrison in response to that tell you anything? [960]

(Testimony of William B. Mead.)

A. Mr. Lotz and I were asked to go out in the waiting room while Mr. Garrison and Mr. Oldberg held a conference. Mr. Lotz and I sat in the reception room for approximately ten minutes time when we were called back into the office.

Q. And when you were called inside, what happened after that?

A. Mr. Garrison stated to me that there would be no lawsuit filed.

Q. And what did you say to that?

A. I said, "Well, under those circumstances we are only too glad to give you every assistance possible, and what additional powers do you feel that you need now?"

Then a discussion was held about the subject matter of the additional powers.

Q. And then on that date did you execute, or did you have your client sign a memorandum dated December the 15th, 1951, in relation to those additional powers?

A. Yes. I believe that Mr. Garrison dictated substantially the document. I may have chipped in with a word or two here and there, but substantially it was Mr. Garrison's dictation.

Q. I am looking at Plaintiff's Exhibit 14, Mr. Mead, and would you look at that?

Mr. Garrison: I think you have the wrong document, Counsel.

(Discussion off the record.)

* * * * * [961]

The Witness: I think this is a different one. As

(Testimony of William B. Mead.)

I recall, the major point in the document I am referring to, there was an express permission to Mid-States to go directly to the post office box of Joe Lotz and receive the mail directly without any intervening hands. I don't recall that this is the document. Isn't there another document prior to this?

Mr. Kakures: Counsel, do you have a copy of the original of that? I don't think it is in evidence yet, Your Honor.

Mr. Garrison: I don't happen to have one. Let's see if we can find it for you. I am sorry Counsel didn't ask me for this a little earlier.

Mr. McKinnon: We asked Counsel for it about three weeks ago and they didn't provide it. By a Court order of——

Mr. Garrison: (Interposing) You saw all our files. Whether you saw it or not, I don't know.

Mr. McKinnon: No, I didn't see that and knew nothing about it.

Mr. Garrison: Can you go on, Counsel, while we look for this?

Mr. Kakures: Yes.

The Witness: I don't think I have quite finished before.

Mr. Kakures: Go ahead, Mr. Mead.

The Witness: I place that document due to the discussion of the fact that Mid-States wanted to have further access to [962] the mail, and, secondly, on the return trip over the bridge, Mr. Oldberg gave Mr. Lotz the paycheck for the prior period, and my recollection is that the pay periods were

(Testimony of William B. Mead.)

the 1st and the 15th and the check wasn't given to Joe until after this document was signed in the office of Mr. Garrison.

Q. In other words, under the agreement, was Joe Lotz hired by Mid-States Insurance Company?

A. Well, that was part of the agreement of November 27, 1951, that Joe's drawings were to be limited. I don't recall the exact amount. I believe his drawing was to be limited henceforth to, I believe, not to exceed \$600 a month. [963]

Q. Going back to this memorandum which was executed in Mr. Garrison's office on December 15th, Mr. Mead, since the original or copy hasn't been found as yet, I hope I can—. Do you remember what was in that document?

Mr. Garrison: I suggest we wait and find it and then we will be sure.

The Witness: A. Well, I have stated already the major point that I recall in it. I had a copy of that which I turned over to Mr. Dusky at his request, and since that time, which was at least a year and a half ago, I have seen neither the original nor a copy of that, so that the only point that remains very clear in my memory is the one about Mid-States wanting to have first access to the mail.

Mr. Kakures: Q. I see. And if you allowed your client, Joe Lotz, to sign that agreement on December 15th, or that memo, and he appeared in Mr. Garrison's office, and the assurance of Mr. Garrison and other Mid-States officials was that there would not be any lawsuit in this matter, is that correct?

(Testimony of William B. Mead.)

A. That is correct.

Q. Now, shortly after the 15th of December, Mr. Mead, did you have occasion to call Mr. Ray Titus of the Mid-States Insurance Company?

A. Yes. I don't recall the exact date of that. It was the same date that the telegram went forward to Mr. Titus. As I recall, it was either just before or just after Christmas. [964] That was a long distance telephone call made by me from Joe Lotz' office to Ray Titus in Chicago.

Q. What was the scope of that phone call?

A. The purpose of my call to Mr. Titus—or I should say what I said:

I called Mr. Titus to verify whether or not Mid-States was going to go ahead and continue to write policies or whether they were definitely going to write no more policies through the Joe Lotz Agency.

Q. And what was Mr. Titus' answer to that?

A. His answer, as I recall, was that they saw no purpose in continuing on with the Joe Lotz Agency and didn't intend to write any more insurance through it.

I then stated to him that I still thought that if Mid-States would cooperate, that it was possible to keep the Joe Lotz Agency going and also to minimize the losses that then appeared to be facing Mid-States. He stated that he didn't see how that could be done.

I stated to him that I thought it could be through the device of cancelling out the Mid-States policies and replacing the cancelled risks with another com-

(Testimony of William B. Mead.)

pany that we had had a preliminary contact with, the new company's policies to be written on straight cash commissions as opposed to the contingent commissions that were involved in the Mid-States deal; that by cancelling Mid-States policies there would be a [965] recapture of the advanced commissions to the agent. Then on top of that there would be an additional cash commission immediately realizable upon the substituted policy.

Mr. Titus said that that was pretty much what I had told him several days before when he was still in Oakland, and that he couldn't get it through his head how that was possible. So I said, "Well, I will send you a telegram."

I then prepared the telegram. Mr. Lotz, as I recall, signed the telegram, and that summarized the proposal that was made. And, if my memory is correct, the net figure showed that the ultimate loss to Mid-States if that program were carried through would be approximately \$32,500. Both Mr. Titus and Mr. Oldberg said that if that would get the ultimate loss below \$60,000, they would write it off and forget about it.

Mr. Kakures: Your Honor, would you like to take the recess?

(Short recess.)

Mr. Kakures: Q. Mr. Mead, before the recess you were testifying as to that phone call you made to Mr. Titus in relation to the plan. Now, did you make any other additional—have any other addi-

(Testimony of William B. Mead.)

tional communication with Mid-States on this matter?

A. With Mr. Carl Oldberg, who was present more or less all the time in Joe's office during the month of December. I told Mr. Oldberg we had made a contact with the *Curt Hitkey Agency* [966] in Los Angeles, and discussed with Mr. Oldberg the phase of the matter of inducing Curt Hitkey to rewrite the Mid-States business in the event they would elect to cancel.

Mr. Oldberg stated that he would pay my expenses and a reasonable fee if I made that trip.

In company with Mr. Joe Lotz I did go to Los Angeles, and on the morning of December 31st I had a meeting with a Mr. John Lynch and another gentleman—I believe his name was Dillingham, if my memory is correct—both officers of the Curt Hitkey general agency. We explained the situation of the Lotz Agency to them, and it was agreed at that meeting that——

Mr. Garrison: (Interposing) If the Court please, I object to any conversation he might have had with Curt Hitkey on the ground that that would be hearsay so far as we are concerned, and also what was agreed would be a conclusion, I think.

The Court: The objection will be sustained.

A. (Continued) Following that meeting Mr. John Lynch came to Oakland to further discuss the arrangement that had been proposed in Los Angeles on December 31st. And following that meeting

(Testimony of William B. Mead.)

the expenses and fee were not paid by Mr. Oldberg or Mid-States.

Mr. Kakures: Q. In other words, that plan fell through, is that correct?

A. Mid-States never did agree to the plan. [967]

Q. Did the Mid-States Insurance Company ever—withdraw that.

Did Mid-States Insurance Company actually operate the Joe Lotz Agency under your agreement?

Mr. Garrison: Objected to on the ground that that calls for his conclusion. I think he should be required to show only the facts.

The Court: If he knows, he may answer the question yes or no.

The Witness: A. The officers of Mid-States, namely, Carl Oldberg, George Kresnik, and from time to time Mr. Titus and Mr. Hatfield, were directing the policy and employees of the Lotz Agency, to my own knowledge, up through the month of December, 1951.

Mr. Kakures: Q. You remember this morning, Mr. Mead, I believe you testified to the fact that, regarding those statements, I believe that ten-page statement by Mr. Smead written on that yellow legal paper which was brought into your office, I believe, approximately on or about December 6th. Was that an evening call?

A. To my knowledge, that statement has never been in my office.

Q. You testified this morning, Mr. Mead, that

(Testimony of William B. Mead.)

you notarized or put your notarial stamp of acknowledgment on that statement, is that correct?

A. I made the acknowledgment of the signature of Ralph Smead [968] upon his statement to me that it was his statement.

Q. In regard to the statement, Mr. Titus, who had testified earlier, stated that when the statement was shown to you you read it out loud and then you proceeded to add your notarial acknowledgment to that. Is that true?

A. I have never, even to this day, read the statement either out loud or to myself.

Q. And why was that?

Mr. Garrison: Objected to, if the Court please—

The Witness: A. Because I disapproved of it.

Mr. Garrison: Objected to, if the Court please, on the ground it would be immaterial why he didn't. The fact is, he said he didn't do it.

The Court: The ultimate fact is that he did not.

Mr. Kakures: Q. What was you—. Did you discuss this matter of the statement with any official of Mid-States Insurance Company?

A. Yes. As I related this morning, prior to any statement with Mr. Hatfield, and on the occasion of putting the acknowledgment form upon the statement, I discussed the method by which the statement had been obtained and requested that it be turned over to me and that I would prepare statements that I would be certain were of facts, and if I prepared them they would be verified in affidavit form.

(Testimony of William B. Mead.)

Mr. Kakures: That's all. [969]

Cross Examination

Mr. Garrison: Q. Mr. Mead, is this the letter that you referred to as having been prepared in my office on the occasion that you and Mr. Lotz came there?

A. No. There was a prior letter, Mr. Garrison. This was a letter that was made out to comply with the regulations of the Post Office Department.

Q. Isn't this the letter that was prepared in my office December 21st when you and Mr. Lotz were there?

A. I don't recall this letter having been prepared at that time.

Q. You said the letter that was prepared referred to the Post Office and the mail, didn't you?

A. Yes, but there was more to the letter than just that one subject. It was to give you, or rather Mid-States, the right to go directly to it, and as I recall——

Q. Right directly to the mail box? A. Yes.

Mr. Garrison: I will ask that this letter be received in evidence, if the Court please.

The Court: It may be admitted and marked.

Mr. Garrison: Q. It does bear Mr. Lotz' signature, does it not?

A. So far as I know, it is. I don't know for sure.

(Whereupon letter dated December 21, 1951, was [970] received in evidence and marked Plaintiff's Exhibit No. 36.)

(Testimony of William B. Mead.)

Mr. Garrison: I will read this, if the Court please.

“December 21, 1951.

“Mid-States Insurance Company,
182 West Lake Street

Gentlemen:

“I hereby grant you permission and hereby give you the key to my post office box 1887, and you are authorized to open such mail box and take from it all mails. And I further authorize you to open said mail and deposit any money included in said mail to my trustee account.

“You will keep a record of all such deposits available for my inspection.

“Yours very truly,

Joe Lotz, General Agent.”

And at the bottom I see it reads in handwriting:

“The undersigned vice-president of Mid-States Insurance Company agree to forthwith deliver to Lotz all mail and money and checks not connected with Mid-States Insurance Company.

Signed, Carl Oldberg.”

Mr. Garrison: Q. Were you present when he wrote that on?

A. I don't recall it. Let me look at that again, Mr. [971] Garrison. No, according to this stenographic indication, this is a letter dictated by Joe Lotz and written by someone with the initials “MK.”

(Testimony of William B. Mead.)

I do not believe that was a document prepared in my presence at any place.

Q. My question only is, were you present when Mr. Oldberg put the postscript on the bottom?

A. I have no recollection of it.

Q. All right. I show you a wire, and ask you if this is the wire you refer to that you sent to Mr. Titus in which you arrived at—rather, that contained your proposal for the solution of Mr. Lotz' problems?

A. This probably is, Mr. Garrison. My recollection is that it was signed "Joe Lotz", and this says "Lotz Insurance Agency." I don't recall, of course, whether this is word for word the way it was, but a letter of confirmation quoting the wire in full also went forward the same day.

Q. Yes, I have that letter, but my reference now is to the wire.

A. I assume that that is about right. It comes out a conservative debit \$32,645.

Q. You took into consideration, did you not, that at that time Mr. Lotz owed companies some \$325,000, according to your statement?

A. I accepted the unaudited figure given to me by Mr. Titus, Mr. Hatfield, and Mr. Kledzik. [972]

Q. And you knew that the premiums on a great bulk of that business had already been collected from sub-agents and disbursed by Mr. Lotz to others, did you not?

A. I knew that there were some that had not been paid for and some that had been paid for, but

(Testimony of William B. Mead.)

exactly how much I didn't know and it didn't make much difference in the ultimate outcome. And I assumed in that wire that the three hundred twenty-five thousand had been paid for and already used up.

Q. Yes, that's right. So that your wire and your proposal contemplates that this business in the name of Mid-States be cancelled and written by some other company? A. That is right.

Q. And did you take into consideration the fact that when Mid-States cancelled this they would have to give the assureds back the premiums?

A. Very definitely.

Q. And your plan contemplated their putting up this return premium, did it?

A. Yes, indeed. And I submitted the whole plan to the auditor and he agreed with the calculations that I made.

Q. That would mean, then, that Mid-States Insurance Company would have to put up some substantial portion of \$325,000? A. Yes.

Q. And you assumed, I take it, that someone else would take that liability on, and knowing that the premiums had already [973] been paid by the assureds and that the money wasn't available?

A. Oh, no. There would be a refund of premiums by Mid-States.

Q. I see. Then you take into account here the \$97,500 credit for commissions?

A. Yes. Taking one policy as an example, Mr. Garrison——

(Testimony of William B. Mead.)

Q. No, I am not worried about examples at the moment. Your plan assumes a \$97,500 commission on this rewrite arrangement.

A. Well, I don't recall the exact figure.

Q. That is what you have here.

A. Whatever is stated there.

Q. And then you say, "Also plus \$32,500 on re-writes," so you assume a commission receipt there of—

A. (Interposing) Oh, that this \$97,500 would be a recapturable credit. In other words, on the cancellation of the policy the agent who had written that particular policy would have to put back his portion of the commission, and that is the ninety seven thousand five hundred referred to. The thirty two-five would be at a lesser rate, a ten per cent commission derived on the new rewrite business.

Q. Did you ever try to collect—

Mr. Bronson: I suggest, Your Honor, that if it is going to be put in evidence it be read now so that Your Honor gets the significance of the comments of the witness and the questions of counsel. Do you intend to put it in evidence?

Mr. Garrison: I didn't intend to. I will if it is of any [974] interest to the Court beyond this short examination.

Mr. Bronson: It must be of interest if you are going to question on it.

Mr. Garrison: Well, I will put it in.

Mr. Bronson: Otherwise, we will have to strike the evidence out as having no bearing.

(Testimony of William B. Mead.)

Mr. Garrison: Mr. Bronson, I will offer it if I decide I want it. If I don't offer it, you can put it in.

Q. Mr. Mead, did you ever try to collect back from agents commissions that had already been paid them on business they had written and that was being cancelled by the company?

A. Not that I recall.

Q. It's an experience you might try some time. But this assumes that every penny of these commissions would be recovered from every one of those agents that had been paid commissions.

A. I would say it would be proper assumption.

Q. And the only thing you needed in putting this over was for Mid-States or somebody else to put up \$325,000, at that time?

A. No, they wouldn't have to put up \$325,000, no.

Q. I see.

Mr. Garrison: To accommodate counsel, I will offer this in evidence.

The Court: Let it be admitted and marked next in order.

(Whereupon document referred to above was [975] received in evidence and marked Plaintiff's Exhibit No. 37.)

Mr. Garrison: Q. Now, you say that on November 27th, at the Leamington Hotel, Mr. Hatfield and Mr. Czar prepared some statement and you were present?

A. I didn't say they were prepared at the Leamington.

(Testimony of William B. Mead.)

Q. They were dictated?

A. I believe they were actually typed in my office, but the substance was prepared by Mr. Czar and Mr. Hatfield.

Q. All right. Now, this substance preparation occurred in the Leamington Hotel, did it?

A. Well, I don't know. No, they were—the documents were all——

Q. I mean the preparation of the document, the background discussion.

A. Well, those were all completed documents with the exception of not being executed at that evening meeting.

Q. Well, then did you start talking about the document dated November 27th that you say was typed in your office?

A. Oh, a number of days before. I can't tell you the exact date, but discussions went on over several days prior to that time.

Q. All right. And the document you are referring to is Plaintiff's Exhibit 6, is it?

A. Yes. This is what I referred to as the statement of [976] intention.

Q. All right. And this has been discussed for two or three days and then it was prepared in your office?

A. It was typed, but it was not prepared in my office.

Q. And where was it—was it typed from notes?

A. Typed from longhand notes, as I recall.

Q. And who made those notes?

(Testimony of William B. Mead.)

A. I understand Mr. Hatfield.

Q. You were not present?

A. I was not present when they were prepared. Just the mechanical typing job was done in my office.

Q. Did you discuss the subject with them when the mechanical typing job was done in your office?

A. I discussed with Mr. Hatfield, I suppose, at one time or another during those three or four days substantially all the matters that are set forth in that document.

Q. And on the occasion when it was typed on November 27th, was Mr. Lotz present?

A. I don't believe he was present when it was being typed.

Q. He came in after, did he?

A. As I recall, I met him that evening and went to the Leamington Hotel.

Q. Were these executed at the Leamington?

A. That's my recollection, that they executed them there at the Leamington. [977]

Q. And yourself and Mr. Smead went to the Leamington, and that is where the document was executed?

A. That's my recollection.

Q. Before it was executed, did you read it?

A. Yes, I read it.

Q. Did Mr. Lotz read it?

A. I assume so, but I don't recall whether I actually saw him read it.

Q. Did it contain a correct statement of facts as you knew them?

A. Not verified facts.

(Testimony of William B. Mead.)

Q. I didn't ask you about "verified facts," but so far as you were concerned, were the statements in here——

A. (Interposing): Let me glance at it again.

Q. Surely.

A. The only matter that I knew very little about at that time was this Public Service matter. Otherwise, I think the rest of the matters had been pretty well discussed.

Q. And it is signed by you as well as Ralph Smead and Mr. Lotz? A. Yes, that is correct.

Q. Now, the document, reading one paragraph here, says—and the letter is addressed to Mr. Hatfield, dated Oakland, California, November 27th:

"Mr. Hatfield: [978]

"I wish at this time of my own free will and accord to relate to you the facts and circumstances surrounding the financial difficulties in which I find myself today, and to explain to you in detail to the best of my knowledge how it happened.

"As far back as last July, I had been losing money and was unable to pay my account to American Plan Corporation and other debtors, and it became necessary for me to use trustee funds in the operation of my business. By August 31, 1951, I was insolvent to the extent of approximately \$100,000, and where I should have had approximately \$190,000 in the trustee account, there was only \$4,000 in hand and in cash in banks."

Mr. Garrison: Q. Did you verify those figures?

(Testimony of William B. Mead.)

A. No. I asked Mr. Lotz and Mr. Smead if they were correct and they said they thought so.

Q. It says: "The American Plan Corporation was insistent that I make a payment on my account, so I made arrangements with the Public Service Insurance Company to pick up approximately \$133,000 of insurance. I paid them a 25 per cent commission for this business which amounted to approximately \$33,000 and received from them a net amount of about \$100,000. I wrote the insurance up in the [979] Mid-States Insurance Company, but instead of leaving it in the trustee account for Mid-States, I paid this money to American Plan on their bill. I still owed them around \$60,000 and so around the first of November I made arrangements with American Plan to cancel about \$60,000 worth of insurance I had written with them but had not paid for and switched this over to Mid-States."

Did you ask them if that was true?

A. Yes, as I recall I asked if that was the fact.

Q. "The result is that I am now unable to pay my account with you which will be due December 1, 1951, amounting to approximately \$64,000, and I don't know where the money is coming from to pay you for the Public Service or American Plan business and the other new business I have been writing; because the latest figures I have from my auditor are October 31, 1951, when I only have \$4,700 cash and \$95,000 due me from my agents and I owed companies \$361,000."

(Testimony of William B. Mead.)

Mr. Garrison: I won't go through the whole letter, but the concluding paragraph is that:

"I again want to ask your consideration of the above plan as a basis for the continued operation of my agency, and will appreciate greatly any [980] consideration you see fit to grant me."

Mr. Garrison: Q. Now, it is a fact, is it not, Mr. Mead, that that was a proposal that Mr. Lotz made to the Mid-States Insurance Company which he hoped they would accept and which they ultimately declined, isn't that correct?

A. No.

Q. Well, they didn't go through with it, did they?

A. They eventually withdrew from it.

Q. Certainly. And the letter was delivered to Mr. Hatfield with the concluding paragraph as a request for consideration.

A. Well, I would say it was Mr. Hatfield's letter signed by Joe Lotz.

Q. Well, it was also signed by you?

A. Yes, that is right.

Q. As his attorney? A. Correct.

Q. And it represented his intent at the moment?

A. Well, it was a letter of intention that was required by Mid-States.

Q. Surely. Now, you recall receiving a letter dated January 24 from Mr. Hatfield—1952?

A. Yes, I do, and I immediately replied to his letter.

Q. I didn't ask you about that. I just asked if you recall receiving this letter. A. M-hm.

(Testimony of William B. Mead.)

Mr. Garrison: I ask that this letter be received in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Thereupon letter dated January 24, 1952, Hatfield to Mead, was admitted into evidence as Plaintiff's Exhibit No. 38.)

Mr. Garrison: I would like to read this, if I may, Your Honor. (Handing document to counsel.)

Q. Referring, while they are reading that, to this letter of November 22nd which you and Mr. Lotz and Mr. Smead signed, on page 2 it says:

"I hereby authorize Mid-States Insurance Company, or any of its officers, agents, or employees to inspect and examine all the books and records pertaining to the operation of my agency at any time, and to pay all out-of-pocket expenses in connection therewith.

"I realize that I have violated my agency agreement with you, and agree that you are not waiving and have not waived any rights accruing to you from such violation, and I further agree that you have the right to cancel my agency agreement, dated September 1, 1951, at any time without notice and with or without cause, and I hereby hold you blameless and harmless for any loss that I might [982] sustain due to such cancellation by you."

You read that in that letter, Mr. Mead?

A. I recall that. We had a discussion about this.

Q. Do you remember the document that was executed by Mr. Lotz dated December 28, which I show you, as Plaintiff's Exhibit 14?

(Testimony of William B. Mead.)

A. I don't have an independent recollection of this at this time. I don't at this moment recall the circumstances of that, Mr. Garrison.

Q. Is it true that you discontinued representing Mr. Lotz about the end of 1951?

A. I think it would be early January, with the exception that I did another favor for him in the spring of the year.

Q. With that exception, you terminated about the end——

Mr. Bronson: Let me have the rest of the answer, if you please, counsel.

Mr. Garrison: I move to strike out the reference to "favor" because it isn't material to my question.

The Witness: A. It was a legal matter is the reason.

Mr. Garrison: Q. I see. When was it, then, you discontinued your professional representation of Mr. Lotz?

A. Well, let me give you a complete answer on that. I told Joe Lotz in October I had a very heavy trial schedule coming up and would just as soon he would find someone who had more time to devote to his matter: that I would give him some time [983] if I could, but it would have to be from time to time and in evenings, and after the first of the year—I don't recall—well, might be up until the first week in January.

Q. Yes?

A. But certainly it would be very sporadic. I may have talked to him a few times.

(Testimony of William B. Mead.)

Q. Have you finished? A. Yes.

Q. The letter of December 28th—the reason I asked you, your lack of familiarity with the letter, that would be occurring just about the time you ceased to be Mr. Lotz' attorney?

A. Well, the last matter that involved any amount of time was the trip to Los Angeles to see Curt Hitkey and return.

Q. I see.

A. And then after that particular time there was very little time that I had available for Joe.

Q. Now, this letter which follows the November 27th letter which I read, which is dated a month later, December 28th, says, to Mid-States Insurance Company:

“Gentlemen:

“Please be advised that I plan on limiting the size of my insurance agency business and plan on vacating the second floor area now occupied by me at 315 Fourteenth Street, Oakland.

“I hereby agree to rent to you all furniture [984] and equipment owned by me and located on said second floor per inventory attached hereto and marked Exhibit A. Should you elect to rent said equipment you shall have the right to do so for a period not to exceed one year for a total rental of \$1200.”

Mr. Garrison: Q. You knew, as a matter of fact, he did make this rental arrangement with Mid-States?

A. My recollection is that some time shortly

(Testimony of William B. Mead.)

after the 15th of December Joe's office was taken over by Mr. Kledzik, and Joe was moved downstairs into new space not previously used by the Lotz Agency, and a greater measure of control over the business was exercised by Mid-States from that point on.

Mr. Garrison: I move to strike out the latter part of the answer as not responsive to my question and being purely voluntary.

The Court: It may go out.

Mr. Garrison: Q. Mr. Mead, reading further:

"You are to have possession of all my books, accounts and records covering my insurance agency business prior to this date. It is understood and agreed, however, that said books and records shall not be removed from the second floor area to be occupied by you, and I and my agents and accountants shall have access to said books and records at any time during business hours. At such time as you have [985] no further use for such books and records, they are to be returned to me.

"You have previously cancelled my general agency appointment and I have executed assignments to you representing monies due me in connection with business written by the Joe Lotz Agency.

"Nothing in this letter or any arrangement in connection with your cancelling this business shall be construed as an agency appointment or contract of employment.

"It is further understood and agreed that your occupancy of the second floor space is an arrange-

(Testimony of William B. Mead.)

ment of convenience only, and shall not be construed as being connected with my activities as an insurance agent.

"I further agree to hold your company and your agents and employees harmless by reason of their actions in the cancellation of any business written by me, the return of the premiums therefor, and the payment of claims arising thereunder, and no liability shall arise to you and them because of the use of any of my books and records because of postings or entries made therein or otherwise.

"Very truly yours,

Joe Lotz." [986]

Mr. Garrison: Q. Unfortunately, you were not aware of that letter, I take it.

A. Let me put it this way, Mr. Garrison: As I sit here, I have no recollection of the circumstances surrounding that. I have been trying to recall whether I was or not, but I don't as I sit here.

Mr. Garrison: Now, the letter I have asked to be introduced as Plaintiff's Exhibit 38 is dated January 24th, and I would like to read it if I may.

It is addressed to Mr. Lotz, registered mail, with a copy to Mr. William B. Mead. It says:

"Gentlemen: This letter is written to record my conversation with Mr. Mead yesterday and also to formally tender to you monies in our possession which belong to agents, assureds, or companies as a result of business placed by Mr. Lotz in companies other than Mid-States.

"On December 28, 1952, you entered into an agree-

(Testimony of William B. Mead.)

ment with Mid-States Insurance Company evidenced by a letter signed by you as of that date, whereby Mid-States took over the second floor of the building occupied by you and rented from you certain equipment used by you in connection with your agency.

"This letter recites clearly the fact that Mid-States had previously cancelled your agency [987] appointment and that the rental of your equipment and the occupancy of that space was an arrangement of convenience only and not to be construed as being connected with any of your activities as an insurance agent, and particularly were the activities not to be construed in any sense as creating a relationship of principal and agent between yourself and them.

"Since that time certain funds have come into their possession in the form of cash and checks as referred to above, and Mid-States has repeatedly attempted to deliver those funds to you for ultimate transmittal to the persons to whom they belong. In my conference with Mr. Mead yesterday, Mr. Mead stated that he was advising Mr. Lotz not to accept the money because both he and Lotz were doing everything possible to make it appear that Mid-States had taken over the Lotz Agency and were carrying it on as an agent of Mr. Lotz. Mr. Mead, to use his own words, said: 'That is the only shelter Joe has.' This subterfuge was originally evidenced in your letter to Mid-States Insurance Company under date of January 5, 1952, wherein you state 'ever

(Testimony of William B. Mead.)

since you took over the Joe Lotz Agency.' That letter was answered by a letter from our counsel, Maynard Garrison, dated [988] January 8, 1952, wherein he stated, 'I wish, however, in this letter, to correct the statement made by you that Mid-States took over the Joe Lotz Agency'.

"So that there will be no question in the future, this letter is recorded for the purpose of first denying any possibility of an agency relationship between the Mid-States Insurance Company and Joe Lotz and to make public the fact that we are fully aware of your effort to create a relationship between yourself and Mid-States Insurance Company in fiction which does not exist in fact.

"Very truly yours, Mid-States Insurance Company, Gerald Hatfield, Vice President."

Mr. Garrison: Q. Do you recall receiving that letter? A. I do.

Mr. Garrison: That is all.

Mr. Kakures: No further questions.

(Witness excused.)

Mr. Kakures: Call Joe Lotz.

JOSEPH P. LOTZ

defendant herein, recalled as a witness, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified further as hereinafter indicated: [989]

Direct Examination

Mr. Kakures: Q. Mr. Lotz, when did you first

(Testimony of Joseph P. Lotz.)

get into the insurance business as either a salesman or broker or agent?

A. As a life insurance agent or general? What do you mean?

Q. Just generally speaking.

A. I started in the life insurance business in 1923.

Q. What was your capacity at that time?

A. I was just a direct agent.

Q. Where was this?

A. In Iowa. Sioux City, Iowa.

Q. What did you do before that?

A. I played some baseball, and I was also in the mercantile business.

Q. And after Iowa, where did you go from there, after you left the State of Iowa?

A. After I left what?

Q. The state of Iowa.

A. I came out here in 1941.

Q. And did you engage in the insurance business at that time?

A. Yes. I worked in the shipyards for a while, and then later on got into the insurance business, two or three years.

Q. And when was your first contact with Mid-States Insurance Company, Mr. Lotz?

A. That was in 1947.

Q. With whom did you meet at that time? [990]

A. With Mr. Donnelly.

Q. Was this in Oakland?

A. This was in Los Angeles.

Q. And your discussion was in relation to your

(Testimony of Joseph P. Lotz.)

getting into the insurance business as an agent?

A. Yes.

Q. Representing Mid-States Insurance Company? A. Yes.

Q. Then did you have occasion to see Mr. Donnelly after that first meeting? A. Yes.

Q. And where was that?

A. He came to Oakland several times.

Q. Did you discuss your problems with him in relation to your business? A. Yes.

Q. And of what kind or nature were they?

A. I mentioned to him that——

Mr. Garrison: If the Court please, we will object to any conversation with Mr. Donnelly in 1947, or any conversation prior to 1951, on the grounds previously stated, that it is remote insofar as the issues of this case are concerned and don't tend to prove or disprove any issues in the pleadings, and incompetent, irrelevant and immaterial.

The Court: I will allow these preliminary questions. [991] Get to what you want and let's get through with the witness.

Mr. Garrison: And may that objection go along with any other questions on the same subject?

The Court: I can't anticipate what isn't before me. Proceed.

Mr. Kakures: Q. In 1951 were you writing insurance in the Mid-States Insurance Company, Mr. Lotz? A. Yes.

Q. And were you also writing insurance for any other insurance company at that time?

(Testimony of Joseph P. Lotz.)

A. Yes. American Fidelity.

Q. Who else?

A. And a small portion with West American, Traders & General, and some various companies where I wrote public liability and various types of fire insurance, and so forth.

Q. And from 1947 to 1950 how did you fare in the insurance business, Mr. Lotz?

Mr. Garrison: May the record show the same objection, if the Court please on the same grounds?

The Court: Same ruling.

Mr. Kakures: Your Honor, I am trying to show——

The Court: (Interposing): He may answer the question.

The Witness: A. I made an average living, if that is what you mean. Is that what you mean?

Mr. Kakures: Q. Yes. [992] A. Yes.

Q. And did you in accordance with the insurance code set up your trustee accounts? A. Yes.

Q. And how did you operate thereon? Did you try to follow the full extent of those provisions there? A. Yes.

Q. And in remitting funds to the insurance companies did you have just one trustee account or did you have various trustee accounts?

A. Just one.

Q. After you put your premiums collected in this trustee account, was there any way of segregating those belonging to the companies? A. No.

Q. Did that concern you at all, Mr. Lotz?

(Testimony of Joseph P. Lotz.)

A. No. It was all in one fund.

Q. And to your knowledge at that time in the insurance business was that the custom of the trade, or regular usage? A. Yes.

Q. When did you have occasion to first meet Mr. Hatfield, Mr. Lotz?

A. In 1949 or 1950. I imagine it was the latter part of 1949, possibly.

Q. At that time, when you first met Mr. Hatfield, had you [993] also at that time had an agency agreement with the American Plan?

A. Not in 1949, no.

Q. When did you first write for the American Plan?

A. Actively, approximately in January of 1951.

Q. You took a trip to Chicago, did you, in 1951?

A. I went to New York and stopped in Chicago on the way back.

Q. What was the purpose of your trip there—to New York?

A. Mr. Hart requested that I come to New York to discuss our problems.

Q. I see. And your problems were financial, weren't they? A. Yes.

Q. And then you went to Chicago from there?

A. Yes.

Q. And whom did you see there?

A. I saw Mr. Titus, Mr. Reynolds, Mr. Hatfield, and most of the officials of the Mid-States.

Q. That was in relation to seeking another contract with Mid-States, is that correct?

(Testimony of Joseph P. Lotz.)

A. Not just another one, but an improvement of my contract if I could.

Q. Then you came out to the coast, is that correct? A. Yes.

Q. Then how soon after that did Mr. Hatfield come out to see you? Let's see, you got here sometime in August, did you? [994]

A. Yes. It was, let's see, around November, I think.

Q. And according to Mr. Hatfield's conversation, during this period of time you drove him over to San Francisco, I believe. A. Yes.

Q. To see the insurance commissioner, is that correct? A. Yes.

Q. During this period of time, November, did you discuss your situation with Mr. Hatfield?

A. Yes.

Q. And exactly what did you discuss? I mean, generally speaking.

A. Well, the discussions were concerning possibly—possibly the big item was getting a readjustment of rates with the insurance department.

Q. I see.

A. That is one reason we came over almost every day to see the insurance commissioner. I did not go up to see him, but I waited. We had hopes of getting those rates readjusted, but we failed.

Q. At that time did Mr. Hatfield tell you that he would do the best he could possibly do for you under the circumstances? A. Yes.

Q. And what was the nature of that assurance?

(Testimony of Joseph P. Lotz.)

A. Well, there was no real assurance. And most of our discussions were worked out with Mr. Mead in the office along the [995] lines of what Mr. Mead testified. I don't know what other discussions there were, much.

Mr. Kakures: Your Honor, would you like to take a recess until tomorrow morning?

The Court: You can go ahead. I will run until six o'clock tonight so we can make some headway here. Proceed.

Mr. Kakures: Q. Then when you talked about your problems, Mr. Hatfield told you that he would try to do everything he could for you, is that correct?

A. Well, I don't remember those words.

Q. Did you have assurance from any official of Mid-States during your financial crisis there in 1951 that they would do what they possibly could for you if you cooperated with them?

A. That was the general trend, yes.

Q. I see. And coming down to these assignments, and these powers of attorney and all the other documents that have been put in evidence and which you have seen and executed, you executed those with the knowledge that you would get the cooperation from Mid-States, as much as they saw fit to give you, is that correct? A. Yes.

Q. And one of those promises was that they wouldn't file a lawsuit against you, is that correct?

A. Yes.

(Testimony of Joseph P. Lotz.)

Q. And another was that they would try to keep you in [996] business? A. Yes.

Q. And the assignments also provided for them taking over your business, is that correct?

A. Yes.

Q. And what did that entail? Did you just step out from your office, Mr. Lotz?

A. I rented a space on the first floor. My office had been on the second floor and still was.

Q. Were you writing insurance for anybody at that time when you stepped out?

A. I have a few companies that I was transacting a small amount of business with, yes.

Q. You turned all your assets and all your equipment over to Mid-States, is that correct?

A. Yes.

Q. And you also gave them the authority to open your mail, is that correct? A. Yes.

Q. And that was done under the condition to which Mr. Mead testified, is that correct?

A. Yes.

Q. And when did Mid-States revoke your agency agreement, Mr. Lotz?

A. I think it was in January, latter part of January. [997]

Q. Who informed you of that?

A. Well, I was informed by a letter from Chicago, I think signed by the president of the company.

Q. And did you respond to that? A. No.

(Testimony of Joseph P. Lotz.)

Q. Did you try to answer that letter revoking your agency at all? A. No.

Q. How was your health? Strike that. Was your health affected by this action by Mid-States?

A. My health wasn't very good at that time due to the difficulties I had.

Q. After this revocation of your agency, Mr. Lotz, what happened after that?

A. Well, after that I had an operation, and when I got well—Is that what you want to find out, Mr. Kakures, or what?

Q. In other words, did you continue in the insurance business after that?

A. I continued in the life insurance business.

Q. And at the present time what is your occupation? A. Life insurance business.

Mr. Kakures: That is all.

Mr. Garrison: I have no questions.

The Court: Any questions?

Mr. Bronson: No, we have no questions.

(Witness excused.) [998]

The Court: Now, how many other witnesses are going to be called in this case? Let's try to check up on what is ahead of us.

Mr. Bronson: Our case is concluded with the conclusion of Mr. Marks' testimony, the accountant, except for any possible testimony that may be aduced from rebuttal.

Mr. Kakures: We are concluded, Your Honor.

Mr. Garrison: We will cross-examine Mr. Marks

in the morning, and we will have three short rebuttal witnesses and should finish comfortably tomorrow.'

The Court: Will you get through by noon, tomorrow, do you think?

Mr. Garrison: That might be a little tight.

Mr. Bronson: That is your answer, I guess.

The Court: Well, I will convene at 9:30, if you wish.

Mr. Garrison: Fine with me.

Mr. Bronson: That is agreeable.

Mr. Garrison: You would like us to try to finish by noon?

The Court: I want to give you all the time you wish.

(Further discussion relating to adjournment and setting time for argument omitted.)

(Whereupon an adjournment was taken until 9:30 a.m., Friday, May 14, 1954.) [999]

The Clerk: Mid-States Insurance Company and Anglo-California National Bank versus American Fidelity and Casualty Company, et al., further trial.

Mr. Garrison: Ready.

Mr. McCallum: Ready.

Mr. Bronson: Ready.

MARTHA KEYES

a witness called on behalf of the plaintiff herein in rebuttal, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: State your full name and occupation to the Court.

The Witness: Martha A. Keyes.

The Clerk: Will you please keep your voice up?

Mr. Garrison: A little louder. This is a large room, and it is hard to hear.

The Witness: I am a secretary.

Direct Examination

Mr. Garrison: Q. Where do you reside?

A. In Hayward.

Q. And are you employed? [1001]

A. Yes, I am.

Q. And what type of work do you do?

A. Secretary.

Q. Were you during the year 1951 employed by Mr. Lotz in Oakland? A. That is right.

Q. And what were your duties there?

A. I was secretary to Mr. Lotz and Mr. Smead, who was General Manager.

Q. Are you married? A. Yes, I have.

Q. Have a family? A. Yes.

Q. How long were you employed by Mr. Lotz?

A. Very close to a year. It was from April, 1951 to—I left the employment the 27th of February, 1952, but actually it wasn't Mr. Lotz the last couple of months.

(Testimony of Martha Keyes.)

Q. What, in addition to your secretarial duties for Mr. Lotz, did you do?

A. Well, actually everything I did was in the nature of secretarial work—opening the mail and, oh, there was a certain amount of supervision at the time in the absence of either Mr. Lotz or Mr. Smead.

Q. Did you have anything to do with the teletype machine?

A. Yes. In fact I was sent over to the teletype company [1002] instruction in how to operate it when they first got it.

Q. Did you operate it while you were there?

A. Yes, I did.

Q. How did you operate a teletype machine?

A. It is very much like a typewriter, except that it is like a telephone in the respect that you are answering and receiving. You can send them and wait until they say “end” and get the information.

Q. In other words, there is a roller of paper that comes across, and you type the message on that paper, and you sit there and the report is transmitted to the person to whom it is being sent?

A. That is right.

Q. There is a permanent record of the message kept?

A. That is right. You tear it off and put it in a permanent file.

Q. And did you maintain a file in Mr. Lotz' office for teletype messages?

A. That is right, yes.

(Testimony of Martha Keyes.)

Q. Where was that file kept?

A. In the correspondence file in the front.

Q. Was that near your desk?

A. Yes, the correspondence file was next to my desk.

Q. That was what kind of a file?

A. It was a regular steel file and was of legal size. [1003]

Q. What was the character of the file where the teletypes were kept?

A. They were ordinary manila folders, alphabetized.

Q. And these messages would be torn off? They would be different sizes, I presume?

A. Yes. Some would be small and some large, but they would be in date order in the file.

Q. What instructions did you have from Mr. Lotz with respect to maintaining those messages?

A. Actually, I hadn't any particular instructions as to how to keep them.

Q. What would you do?

A. I set up the file myself and maintained it, Mr. Garrison.

Q. Did you keep them all?

A. I tried to keep them all. There were many that I couldn't.

Q. Calling your attention to sometime in the latter part of 1951, do you recall a telephone call—Withdraw that.

Did you take telephone messages as they came in?

A. I answered the telephone always if I were at

(Testimony of Martha Keyes.)

my desk, and if they were calls for Mr. Smead or Mr. Lotz, if they were not there I talked to the individual. If they were there, I spoke to the person first to find out who it was.

Q. Keep your voice up, please.

If they were in, then you would transfer the call into [1004] the office involved?

A. That is right.

Q. Do you recall an incident occurring sometime in the latter part of 1951 in connection with a telephone call and a teletype message filed?

A. Yes, I recall.

Q. What happened in respect to a telephone call and the teletype message file?

A. Well, it was with regard to a specific incident where Mr. Smead asked me to bring the teletype file to him while he was on the telephone talking to New York.

Q. He had received a call or sent one—placed a call to New York or received one?

Mr. Bronson: Will you please ask the date of this, Mr. Garrison?

Mr. Garrison: Yes.

Mr. Garrison: Do you recall about when it was?

A. I remember it as being the latter part of September.

Q. Do you know whether Mr. Smead placed the call or the call came to him?

A. I believe it was a call Mr. Smead placed to New York.

(Testimony of Martha Keyes.)

Q. Was the telephone call still going on when you were asked to bring in the teletype file?

A. Yes. He had the receiver off the hook.

Q. Did you take the file in? [1005]

A. Yes, I did.

Q. And he was then with the receiver in his hand? A. That is right.

Q. What did you do?

A. I went back to my desk and closed the door.

Q. Left the file there?

A. That is right.

Q. Did you see the file thereafter?

A. Yes. It was my custom to go in and pick up anything in the way of files in the afternoon.

Q. And did you see the file?

A. I went in and got the file, yes.

Q. Was Mr. Smead there?

A. He was there, yes, sir.

Q. Did you have a conversation with him about it?

A. Yes. I asked Mr. Smead if I should pick up the messages that were out of the file on his desk, and he said, "No," he would give them to me later.

Q. Did he ever give them to you?

A. No. I asked him for them the next day, and they were no longer on his desk, although I tried to locate them.

Q. Did you ever see those messages again?

A. Never saw those messages again.

Q. Did you have a request from someone in con-

(Testimony of Martha Keyes.)

nection with Mid-States to make a copy of the teletype messages in the file? [1006]

A. Yes. That was in November.

Q. 1951? A. 1951, yes.

Q. Do you remember who asked you to make that copy?

A. If I remember right, I believe it was either Mr. Hatfield or Mr. Titus.

Q. Did you make such a copy?

A. Yes, I did.

Q. I will show you——

Mr. Garrison: You were furnished this, Mr. Bronson.

Mr. Bronson: Is it the same as the others?

Mr. Garrison: No. The one you have has a different heading to this. This is a copy of the file that she made.

Mr. Garrison: I show you a typewritten, clamped-together series of statements, and ask you if you know what that is?

A. This is the teletype file that I typed up at the time in November at the request of Mid-States.

Q. And does that contain all of the teletype messages that were in the file when you typed them up?

A. All the ones that were in the file at the time I typed them up, yes.

Q. Can you tell whether, by looking at this, there were teletype messages—that teletype messages were received in the Lotz office while you were employed there which are not in the file? [1007]

(Testimony of Martha Keyes.)

A. I would like to say this, there is one place in here I do notice that I made a comment to that effect; but there are many places—I can't point them out specifically, but at the time, I remember the typing, I knew there were other messages, but I couldn't be sure at that time.

Q. When you typed this up at the request of Mid-States officials, did you have a conversation with any of them and Mr. Smead regarding the absence of certain messages? A. Yes.

Q. Will you tell us when that occurred?

A. That was a conversation at the time I was typing it up, and because of my concern because I didn't have all the messages.

Q. Just a minute. I haven't asked for the conversation. A. Oh.

Q. Where did that occur?

A. 315 Fourteenth Street, in the office.

Mr. Bronson: I can't hear the witness.

Mr. Garrison: "That was at 315 Fourteenth Street, in the office."

Mr. Garrison: Q. And one of the gentlemen from Mid-States was there and Mr. Smead was present? A. That is right.

Q. Anyone else?

A. I believe that Mr. Hatfield was there. I am not sure, but [1008] I think Mr. Oldberg was there.

Q. What was said by each of you?

A. At first there was a conversation between myself and, I believe, Mr. Hatfield and Mr. Oldberg. I wanted to know if there was any way I

(Testimony of Martha Keyes.)

could get the rest of them to make a complete file.

Q. What was done?

A. I believe that that was during the time Mr. Smead and Mr. Lotz had taken offices downstairs, although they hadn't officially moved down. But at any rate I was trying to get them, and they had Ralph Smead up to the office.

Q. Did they do that?

A. They did, yes.

Q. And he came up where you were?

A. He came upstairs, yes.

Q. Did you have a conversation?

A. Yes. They asked and I asked him——

Q. Just what was said?

A. I asked where the messages were that I had asked him about previously, that I wanted to complete the file, and he denied at first knowing what I was talking about. He then admitted he guessed he had lost them.

Q. Then you did type whatever messages were in the file?

A. I did type what I could, yes.

Q. I will show you Plaintiff's Exhibit 29, which has been [1009] identified as containing all of the messages that could be found either in the Lotz office or American Fidelity's office, and ask if you can tell us—you may take this copy if you wish—ask if you can tell us whether or not the first document that you refer to as being a copy of your typing contains fewer messages than the one that I have handed you?

(Testimony of Martha Keyes.)

A. Oh, it does contain a different amount, yes.

Q. In other words, can you tell from looking at these that there were a number of messages out of the file from the Mid-States teletypes?

A. Quite a number, yes.

Mr. Garrison: Cross examine.

Cross Examination

Mr. Bronson: Q. Mrs. Keyes, by whom are you now employed?

A. I am employed by Insurance Brokers Witthoft and Farley in Oakland. Would you like the address?

Q. No, that will do, as far as I am concerned.

One of your duties was mail clerk?

A. I would open the mail as it came in in the morning, yes.

Q. Was that a duty you had during the period of your employment with Mr. Lotz?

A. Yes, I always opened the mail, yes. [1010]

Q. You said you were employed up to around February of 1952?

A. The 27th of February was my last day in that office.

Q. At the 14th——

A. At the 14th Street address.

Q. What was that date in February?

A. 27th of February.

Q. And you were being paid by whom during the period of your employment in 1952? That would be January and February.

(Testimony of Martha Keyes.)

A. From January 1st to the 27th of February, my salary check was from Mid-States Insurance Company.

Q. Who was in charge of the office during that period of time?

A. Mr. Oldberg was, in January. Mr. Oldberg continued during February. He was in and out of the office constantly, but he was in charge.

Q. Was Mr. Hatfield there at any time during those months?

A. Intermittently he was there.

Q. Intermittently? A. Yes.

Q. At what intervals or times would you see Mr. Hatfield?

A. We would see him for a week, maybe three weeks, and then he would be gone two weeks, and then he would be back for another week.

Q. And the situation regarding Mr. Hatfield and his appearance [1011] there in your office in Oakland did extend from sometime in November, 1951, is that right?

A. That is right. Mr. Hatfield was in the office at that time.

Q. Roughly, over a period of three months or more?

A. Oh, close to four, three and one-half.

Q. Yes. Now, the incident you recounted when Mr. Lotz' business was downstairs and the Mid-States had an office upstairs—Am I correct in that description?

A. As I said before, Mr. Lotz and Mr. Smead

(Testimony of Martha Keyes.)

moved downstairs—they didn't move downstairs officially until the first of January, although they had taken a space before that time.

Q. And it was after that that this incident occurred when you say Mr. Smead was called upstairs from the downstairs office, that is, upstairs into the Mid-States area, and inquiry was made about the teletypes, is that right?

A. That is right. So far as the girls in our office knew, Mr. Smead was still our employer in November.

Q. But I say the incident of Mr. Smead and questioning him about some teletype messages that were lost, or at least weren't in your file, that occurred sometime in January after the separation of the offices had occurred, am I right in that, Mrs. Keyes?

A. No, sir, it was in November.

Q. How do you fix that date? [1012]

A. Because it was at the time that I was typing this teletype book from the messages and that was in November.

Q. Well, did that conversation take place upstairs?

A. It took place upstairs near my desk.

Q. Oh. Well, I just don't know what the significance of it is, but had you lost teletypes before that?

Mr. Garrison: I move Counsel's statement about whether he knows the significance of it or not be stricken out as a voluntary statement, not a question, and self-serving.

(Testimony of Martha Keyes.)

Mr. Bronson: I don't intend to be self-serving here, Your Honor. All I am getting at is, if the lady will remain here while some other witness is called, maybe she can be recalled for further cross examination.

The Court: Reframe your question.

Mr. Bronson: I will withdraw the question, if the Court please.

Mr. Bronson: Q. You say Mr. Smead first denied knowing anything about it?

A. At first Mr. Smead was hesitant and said—In fact, I can almost say exactly what he said. He said, "I don't know what you mean. I don't know about any messages," and I said, "Why, you do remember, Ralph, it was a couple of months ago when we talked about them when you took them out of the file."

"Oh, those," he said, and I said, "All right, now do you remember?" [1013]

And he said, "Oh, I guess I must have lost those," and he laughed and walked away.

Q. Did it appear to you there was any significance in his remembering it after you reminded him?

A. No, sir, there was no significance.

Q. You stated that the other incident when he was on the telephone on a connection that you had made and transferred to him on a New York call, that you laid your entire file of teletypes on his desk?

(Testimony of Martha Keyes.)

A. Took the folder out of the desk and took it over to him.

Q. Did you have teletype messages with any other concerns than American Fidelity—I mean the American Plan?

A. I believe it was just the American Fidelity—Well, American Plan, American Fidelity and Casualty. It was the AFC Operator we used to send messages to and receive messages from.

Q. You were supplied with a book for the entire United States of concerns in each city and state that have teletype machines, were you not?

A. Yes.

Q. Did Mid-States have a teletype in their office?

A. I don't think—I don't remember that. I can't remember. I don't think we ever teletyped them.

Q. Did you teletype any place else besides—

A. (Interposing) I would like to make it clear, I wasn't [1014] the operator all the time. I know how to operate it. We did have another girl that sent and received most messages.

Q. But you don't know whether Mid-States had a teletype connection or whether your concern—

A. (Interposing) I don't think so. I don't remember them having one, no.

Q. You will remain in the courtroom during the morning, will you, please? A. Surely.

Mr. Bronson: That is all, thank you.

(Testimony of Martha Keyes.)

Redirect Examination

Mr. Garrison: Q. I have one more question:

Mrs. Keyes, were you contacted by anyone representing the defendants in this case before I called you?

A. Yes, Mr. Tiedeman telephoned me at the office one day.

Q. And did he discuss your experience with the Lotz Agency with you on the telephone?

A. Yes. His questions were regarding the correspondence file.

Mr. Garrison: That is all, thank you.

(Witness excused.)

Mr. Garrison: I would like to ask, if the Court please, that this transcript of teletypes that is certified as being those she made be received in evidence as Plaintiff's Exhibit [1015] next in order.

The Court: They may be admitted and marked, Plaintiff's Exhibit next in order.

(Whereupon transcript of teletypes referred to and described above were received in evidence and marked Plaintiff's Exhibit No. 39.)

JANICE S. HOWARD

a witness called on behalf of the plaintiffs in rebuttal, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: State your full name and occupation to the Court.

The Witness: Janice S. Howard, housewife.

Direct Examination

Mr. Garrison: Q. Where do you reside, Mrs. Howard? A. San Lorenzo.

Q. Do you have a larger voice volume, Mrs. Howard? Can you speak up so we will be sure to hear you? A. I shall try.

Q. Are you employed?

A. Not presently.

Q. Were you during the year 1951 employed by Mr. Lotz? [1016] A. I was.

Q. What were your duties?

A. I worked in the accounting department, specifically with receivables.

Q. Did you have to do with posting the books and taking care of entries involving receivables?

A. Yes. The actual accounts were posted by machine, by an operator.

Q. I see. And who was in charge of your department? A. Faye Roach.

Q. Receivables, do you mean—. What do you mean by "receivables?"

A. The policies. The receivables from our agents.

Q. Balances due from sub-agents?

(Testimony of Janice S. Howard.)

A. That is right.

Q. Do you recall in August of 1951, Mr. Hart being at the Lotz Agency?

A. Yes, I do.

Q. You do know Mr. Hart, do you, as being President of the American Plan? A. Yes.

Q. Did you receive a request at the time he was around the Lotz Agency in August for some figures?

A. Yes.

Q. And from whom did you receive the request?

A. From Ralph Smead.

Q. And what did you do as a result of that request?

A. We taped the agents' accounts receivable for the outstanding American Fidelity.

Q. What do you mean, you "taped" them?

A. We ran a tape on the outstanding figures.

Q. And did you complete that?

A. Yes, we did. As I recall, it was recapped.

Q. Then turned it over to someone?

A. To Faye.

Q. To your——

A. Head of our department.

Q. To your immediate employer?

I show you a tabulation on American Fidelity and Casualty Company stationery, and ask you if that represents—if that is a copy of the tabulation that you made at that time? I take it a "tab" is an abbreviation of "tabulation"?

A. That is correct.

(Testimony of Janice S. Howard.)

Q. Do you recall how long it took you to do that?

A. I don't believe we worked on it constantly. I would say over a period of two weeks. We still kept up our current work.

Mr. Bronson: Could I have that repeated, please?

The Witness: I don't believe we worked on that steadily, so I would say over a period of two weeks these figures *were* [1018]

Mr. Garrison: Q. Ignoring the handwritten material at the bottom, just calling your attention to the typed material, can you tell us if that is a copy of the receivables that you made up?

A. I would say yes, it was.

Q. And this a document consisting of one-half page on Page 1 and Page 2?

A. You are right.

Q. And now I will show you Plaintiff's Exhibit 22, which is a handwritten statement of two pages dated 12/18/51, and ask if you recollect having ever seen that before?

A. Yes, it is a statement that we witnessed for Mr. Smead.

Q. At the request of whom?

A. Mr. Smead. [1019]

Mr. Bronson: What exhibit is that?

Mr. Garrison: Plaintiff's Exhibit 22. I would like to read this, if I may, so the witness will have it in mind:

(Testimony of Janice S. Howard.)

“Joseph Lotz Insurance Agency, 12/18/51.

“During day of August 20th, 1951, while Mr. Mark Hart was in Joe Lotz’ office I was asked to furnish him with the following information:

“Total premiums payable to Co.’s.

“Total receivables.

“I spoke with our bookkeeping department in the presence of:

“Mrs. Janice Howard

Miss Lyla Bowman

Miss Faye Roach.—”

Do you recall, that is the conversation you mentioned?

“and a tape was run to furnish the above requested information. To the best of my recollection the below figures are approximately correct:

“Total premiums payable \$287,000.00

“Total receivables \$75,000.00.

“The following day, August 21st, 1951, I was asked to compile a listing by policy number, name of insured, amount of premium, and by individual agents, the unpaid American Fidelity and Casualty Company accounts receivable. This information was [1020] compiled by Miss Roach and Miss Bowman of this office, and I believe that the figure below is the approximate total amount, by agents, of American Fidelity and Casualty Company receivables:

“Total AF&C receivables—\$51,000.00.

Signed “Ralph L. Smead.”

And at the bottom, dated 12-18-51, there is in this record:

(Testimony of Janice S. Howard.)

“The undersigned recall incidents set forth in the above statement of Ralph L. Smead with the exception to verification of amounts involved.”

That is signed “Faye Roach, Lyla May Bowman, Janice S. Howard”.

Mr. Garrison: Q. That is your signature?

A. It is.

Q. And do you recall the circumstances surrounding the preparation of this statement?

A. Yes, I remember when we were asked to do it and my part in doing it.

Q. Where was it?

A. 315 Fourteenth Street.

Q. At the Lotz office? A. That's right.

Q. Who asked you for it?

A. Ralph Smead.

Q. And that was on the date indicated, December 18th? [1021] A. Yes.

Q. As I take it, you didn't have any personal contact with Mr. Hart? All you did was follow instructions given you by your superior, Miss Roach?

A. That is correct.

Q. And when your work was completed, you handed it to her? A. That is right.

Q. Did you have any instructions while you were working from anyone as to when you were going to get it out, or how soon you were going to get it out, or anything of that kind?

A. Not that I recall.

Mr. Garrison: Cross examine.

(Testimony of Janice S. Howard.)

Mr. Bronson: I am going to put the document in evidence if you have the figures on.

Mr. Garrison: Let's offer it. I will ask that this be received as plaintiff's exhibit next in order.

Mr. Bronson: Whose does it appear to be? Plaintiff's?

Mr. Garrison: Yes.

Mr. Bronson: It was filed on your desk, counsel, until I asked for it.

Mr. Garrison: Well, I overlooked putting it in. I don't think it is of any importance who puts it in.

The Court: Let it be marked in evidence.

(Whereupon document previously marked Plaintiff's Exhibit 40 for identification, "Recap of [1022] American Fidelity Unpaid Items", was admitted into evidence as Plaintiff's Exhibit No. 40.)

Cross Examination

Mr. Bronson: Q. This may be a little repetitious, but with regard to Exhibit 40, Mrs. Howard, have you ever seen that before today?

A. No, I haven't; not since it was prepared.

Q. Well, you saw it, then, when it was prepared?

A. Yes.

Q. When was it prepared with reference to the time Mr. Hart was out in Oakland in August of 1951?

A. I would say it was prepared some time between August and December, 1951.

Q. Some time between August and December, 1951? And without pressing the matter any fur-

(Testimony of Janice S. Howard.)

ther than this, is that exhibit accurate as to the place and the time when the data that had been gotten together was compiled into this page?

A. Yes, it is. I don't recall the exact month or day.

Q. You did say, I believe, it took two weeks to get it together?

A. I would say that is about the time.

Q. Counsel has referred——

Mr. Bronson: I am not going to take time, Your Honor, to hand this up to you. I don't think it is necessary for my [1023] cross examination. But it has on each of its two pages, two columns of names of individuals or companies, and opposite each name in the two columns on each page is a figure representing money.

Mr. Bronson: Q. Is that right?

A. Yes.

Q. And have you any explanation why in the preparation of this exhibit the first page only goes halfway and leaves room for a pen and ink subscription, and in the second page it runs clear down? A. No, I don't.

Q. Who actually types up this exhibit?

A. That I don't know.

Q. Where is the original of it, this being obviously a carbon? A. I don't know.

Q. I don't know whether you were asked, but I would like to get the information in any event: When did you go to work for the Lotz Agency?

(Testimony of Janice S. Howard.)

A. I believe it was in June, first part of June, first week in June of 1951.

Q. To what date did your employment either for the Lotz Agency or the successor to it, Mid-States Insurance Company, extend?

A. 23rd of December.

Q. Of 1951? A. Correct. [1024]

Q. Where is Faye Roach now, if you know?

Mr. Garrison: She will be here at eleven o'clock, Mr. Bronson.

Mr. Bronson: All right.

Q. Can you explain the circumstance that Exhibit 40 is undated? A. No, I cannot.

Q. Can you explain the circumstance that the document contains no reference to the date as of which these figures apply, whether in June, July, August or any other month or day down to the end of December, 1951? A. No, I can't.

The Court: "No, I can't", you say?

A. (Nodding in the affirmative.)

Mr. Bronson: Q. This does not purport to be—. Well, I will ask you first, this is supposed to be the account of receivables due from these people whose names appear or companies whose names appear on the exhibit? A. Yes.

Q. And it doesn't purport to state to which companies or company accounts, if those mean due to the company, insuring company, the figure applies?

A. It doesn't state on that list, no.

Q. No. Did you assist in the preparation of the

(Testimony of Janice S. Howard.)

figures that are represented on this Exhibit 40?

A. Do you remember how many agents by number are represented here? A. No, I don't.

Q. I made a rough calculation of something like 125. Would that be about right in your recollection of the general number of names that appear on Exhibit 40?

A. I believe that would be approximately correct.

Q. Are they all sub-agents of the Lotz General Agency? A. Yes.

Q. Referring to Exhibit 22—I think I don't need to bring it up, but you can ask for it if you wish it. That is the document that has your signature on the second page of it that Mr. Garrison read a moment ago.

When did you prepare the figures represented by the items "Total Premiums payable \$287,000.00; total receivables \$75,000.00?

Mr. Garrison: That is objected to on the ground, if the Court please, she said she didn't prepare those figures and doesn't even attempt to verify them. The document, Mr. Bronson, I think will clear that.

Mr. Bronson: You are referring to the subscription just above their names?

Mr. Garrison: Yes.

Mr. Bronson: I didn't interpret it that way.

Mr. Garrison: She only worked on receivables, she said.

Mr. Bronson: I didn't interpret it that way and

(Testimony of Janice S. Howard.)

I would [1026] like to pursue it. Withdraw the last question.

Q. Now, when you subscribed the statement in the little subscription at the end——

Mr. Bronson: If I may step up to the witness, Your Honor?

Q. "The undersigned——"

Help me out with that?

A. "——recall incidents set forth in the above statement."

Q. "The undersigned recall incidents set forth in the above statement of Ralph L. Smead with the exception to verification of amounts involved."

You meant by that a bookkeeping verification by getting in touch with the individuals involved in receivables and in payable items direct; that is to say, an accountant's or a bookkeeper's meaning of the word "verification"?

A. I don't believe I understand the question exactly, but——

Q. I am simply asking you if it isn't a fact, when you said, "with the exception of verification of the amounts involved", you meant——

A. (Interposing) It would not be exact to the penny or dollar.

Q. Yes. But you did get some data to go on, had some information on the subject of the items, "Total premiums payable \$287,000.00; total receivables \$75,000.00"?

A. Not the payables. I had nothing to do with payables.

(Testimony of Janice S. Howard.)

Q. Then let's take receivables. You didn't verify them in [1027] the manner you would check with a bank to see what the deposit is?

A. No.

Q. But you had some information. I want to know when you got that together. Was it on December 18th or some later date?

A. No, it wouldn't have been a later date. It would have been about December 18th.

Mr. Bronson: That is all.

Redirect Examination

Mr. Garrison: Q. As I understand it, Mrs. Howard, you didn't type this yourself?

A. No, I didn't.

Q. You ran a tape and gave the taped material to your superior, and whoever typed this was somebody you didn't have any connection with?

A. That is right.

Q. All you know is that this appears to be the list of agents' balances you ran the tabulation on?

A. That is correct.

Q. You did give us the date when you ran the tapes, and they commenced when Mr. Hart was out there?

A. That is correct.

Q. And you are not sure when you completed it?

A. No, I am not. [1028]

Mr. Garrison: That is all.

The Court: You may step down.

(Witness excused.)

ALFRED R. MARKS

recalled as a witness on behalf of the defendant, having been previously sworn, testified further as follows:

Direct Examination—(Continued)

Mr. McKinnon: Q. Have you prepared an adjusted balance sheet as of November 30, 1951, which we spoke about yesterday?

A. Yes, I have.

Mr. McKinnon: We offer this in evidence, if the Court please.

The Court: It may be admitted and marked.

(Thereupon document entitled "Joe Lotz doing business as Joe Lotz Insurance Broker and General Agent, Balance Sheet, November 30, 1951" was received in evidence and marked Defendant's Exhibit S.)

Mr. McKinnon: Q. I have only one more question to ask of this witness:

Mr. Marks, in your examination of the Lotz Agency books did you find any evidence of incorrect balances of accounts receivable?

A. Yes. There were entries during the period from April, 1951, through August, 1951, almost monthly if not monthly, in which [1029] sizeable adjustments were made to the control account for agents' balances to bring it into agreement with detail accounts.

Mr. McKinnon: That is all.

(Testimony of Alfred R. Marks.)

Cross Examination

Mr. Garrison: Q. Mr. Marks, do you have your exhibits with you? A. Yes, I do.

Q. Referring to Exhibit 2——

A. Yes, sir.

Q. Column 2 says, "Cash available including operating and petty cash". Was that a figure that was taken from the books as of a given day?

A. As of the end of the month referred to, Mr. Garrison.

Q. In other words, that represents the balance in the account at the end of the month?

A. That is right.

Q. And it doesn't purport to show any of the in-and-out transactions through that month?

A. No, it does not.

Q. Doesn't purport to show how much money was in the account during the month?

A. No, it does not.

Q. Column 3, "Premiums payable to all companies per Lotz General Ledger", did you have in mind and take into account the [1030] 60 or 75-day credit period in that column?

A. Well, this is the amount of the liability reflected in the accounts as a result of the periodical postings as the cash came in from the agent to reflect the liability. It has nothing to do with credit period.

Q. These are cash receipts?

A. That is right. In other words, that is the

(Testimony of Alfred R. Marks.)

amount owed to the company as the result of collections from the agent.

Q. But it doesn't purport to say that those sums were necessarily payable as of the date shown?

A. No, it does not.

Q. In other words, he may have collected a thousand dollars on the 15th of the month but not owed it to the company until the 30th of the month?

A. That is right.

Q. Now, the last two columns, "Amounts due Mid-States per their records", and the second from the last column on the right, that is the amount due Mid-States also as of a given date?

A. That is right.

Q. And you don't—it isn't your purpose to relate the amount due Mid-States to these other columns, necessarily, is it?

A. No, except with respect to the last column. The balance at that time is fairly comparable to the balances, premium [1031] balances payable to all companies as of the same day.

Q. But that was somewhat of a coincidence?

A. Not necessarily, Mr. Garrison.

Q. Actually, for the most part the two are unrelated. They cannot be related because, in the first place, the cash figure is taken as of an arbitrary day and the balances are likewise taken as of an arbitrary day.

A. Well, except for the fact that the column—the balance in the column, the last column, "Amounts

(Testimony of Alfred R. Marks.)

due Mid-States", is comparable to the balance at the end of the month per Lotz' records.

Q. Sure. That is what was due Mid-States as of the end of the month?

A. With respect to that particular month's transactions.

Q. Sure, that is right. But that's still unrelated to the amount of cash he might have in the bank at the end of the month?

A. It's unrelated as far as the cash is concerned, yes.

Q. Now, going to Exhibit 6——

Mr. Bronson: Schedule 6, you mean?

Mr. Garrison: Schedule 6.

Mr. Bronson: That would be Exhibit L.

Mr. Garrison: I am referring to this batch of exhibits, Exhibit L. Were they all introduced as one?

Mr. McKinnon: No, they were not. They are all separate.

Mr. Bronson: The first one, Mr. Garrison, so the record [1032] will be straight, the one you have been questioning on, is Exhibit J.

Mr. Garrison: Q. The one we were just talking about is Exhibit J—Defendant's Exhibit J.

The Witness: A. Yes.

Q. Now, the one I want to talk about is Defendant's Exhibit L. This is "Cumulative totals of earned premiums and loss ratios on Mid-States business, September 1, 1951, through December 31,

(Testimony of Alfred R. Marks.)

1953.", and you strike averages, cumulative totals, do you not? A. That is correct.

Q. I want to call your attention to the months of November and December of 1951. Do you find that? A. Yes.

Q. What were the month's loss ratios by Mid-States on the business of their books as of those two months?

A. You mean the loss ratio for that particular month?

Q. For that particular month.

A. For the month of November, 1930, for that month only, the loss ratio was 105.71.

Mr. Bronson: Excuse me, you say November, 1930?

Mr. Garrison: Q. You mean November 30th, 1951? A. Right.

Q. And for December 31st, 1951?

A. For the month of December, 1951, the loss ratio in that [1033] month, for the month's computation only, was 103.41 per cent.

Mr. Garrison: Q. Now, subsequent to that date did you find any month in which the loss ratio was that high except the one month down in 1953?

A. No, Mr. Garrison.

Q. As a matter of fact, in January the loss ratio was 30.32—January, 1952? A. Yes.

Q. March, 39.49? A. Yes.

Q. Were you able to tell from your audit of the books that this high loss ratio in November and December, 1951, had any relation to the Public

(Testimony of Alfred R. Marks.)

Service business and the business that they got from the American Fidelity and Casualty Company? A. No, I was not, Mr. Garrison.

Q. You know, as a matter of fact, that they had that business, or some of it, on their books during those months, do you not?

A. Yes, some of the business had been recorded on its books.

Q. Yes. And you know, as a matter of fact, it was all cancelled shortly thereafter, as reflected on the loss records subsequent thereto?

A. Cancellations were——

Q. Yes. A. May I finish my answer?

Q. Certainly. [1034]

A. Large cancellations were reflected in the books in February, 1952.

Q. All right. A. May I finish?

Mr. McKinnon: Will you please let him finish? That is the second time. Please let him finish.

A. However, I had no indication from the records that I saw that specifically identified the Public Service business.

Mr. Garrison: Q. That is what I thought you said before. Now, the averages that you strike here, or the cumulative totals have in them, of course, the high loss ratios in the periods we have referred to? A. That is right.

Q. And you have no way of knowing, of course, what their loss ratio might have been had they not cancelled the Public Service and the American Fidelity business as they did at the end of 1951?

(Testimony of Alfred R. Marks.)

A. Public Service and American Fidelity?

Q. That's right.

A. This only deals with the Mid-States business.

Q. The business that they received from the Public Service, relying on the American Fidelity and Casualty Company.

A. Oh, I understand. I don't know, sir.

Q. It's a reasonable assumption, isn't it, that had they kept the business on the books and not cancelled it, their loss [1035] ratio might have continued for the subsequent months in the same approximate ratio as it had in November and December?

Mr. McKinnon: I will object to that question, if the Court please, as calling for an assumption.

Mr. Garrison: Very well, I will withdraw it. I think it is clear enough. I suppose it is too much to assume.

Q. Now, referring to Defendant's Exhibit O, Schedule 9, this you say is a computation of funds, exclusive of Mid-States premiums, available for settlement of account with American Fidelity and Casualty Company, December, 1950 to November, 1951.

I take it that in part this is a theoretical exhibit?

A. This exhibit was prepared on the basis of instructions from Mr.—

Q. (Interposing) Regardless of who told you to do it, the fact is that the exhibit makes certain arbitrary assumptions and to that extent is a theoretical exhibit? A. Yes, sir.

(Testimony of Alfred R. Marks.)

Q. Certainly. Now, in making these computations you took the net premium funds, which were collected by Lotz on AFC policies after commissions to sub-agents? A. That is right.

Q. You struck that off as \$225,914, right?

A. That is right.

Q. And then you made a total of the funds remitted to the American Fidelity and Casualty Company by Lotz and/or sub-agents [1036] at two sixty five nine? A. That is right.

Q. Did you give any effect in those two totals of the cancellation and rewrite of \$61,000 of business that was taken from American Fidelity's books and put on the books of the Mid-States Insurance Company?

A. No, that wasn't a cash transaction insofar as here, and could not be determined.

Q. Yes, I admit there was no cash involved in it. But didn't Mr. Lotz receive the commissions on that business when he wrote it in the first instance in the American Fidelity and Casualty Company?

A. Yes. From the viewpoint of the commissions earned on the business originally written. I am not sure whether it would be in this period, Mr. Garrison, but I think it would be because this is the period covering the entire operation.

Q. This represents the total period?

A. That is right.

Q. In which Lotz and the AF&C had any business transactions? A. That is right.

(Testimony of Alfred R. Marks.)

Q. So that if he wrote this \$61,000 of business in the AFC Company in the beginning, there would have been a commission to him, wouldn't there?

A. That's right.

Q. And you didn't include that in your total?

A. The commission is in here.

Q. Is in——

A. (Interposing) In other words, if the commission—to the extent that such commission was earned by Lotz—and remember the commissions were credited to him on an earned premium basis—if that commission was earned by Lotz and paid to him it would be included in the commission and other income from all sources.

Q. All right. Now, then, in the latter part of 1951 that \$61,000 of business was removed bodily from the liability column of the American Fidelity and Casualty Company, wasn't it?

A. That is right.

Q. And to that extent they received, in effect, payment for \$61,000 worth of business because they lost the liability?

Mr. Bronson: That calls for a conclusion, Your Honor.

Mr. Garrison: He is an expert. He can give his conclusion.

Mr. Bronson: "Theoretical", counsel says.

Mr. Garrison: In other words, they had removed from their liabilities——

The Witness: A. Removed the necessity for collecting sixty one thousand.

(Testimony of Alfred R. Marks.)

Q. And that was just the same, so far as their account was concerned, as if they had been paid sixty one thousand?

A. So far as their account was concerned, it would reflect a net balance position the same as though the cash had been [1038] remitted.

Q. A transaction favorable to them to the extent of \$61,000 liabilities?

A. The liability of the Lotz Agency to American Fidelity was reduced by \$61,000.

Q. Could have been accomplished by the payment of cash as easily as by the removal of the liability?

A. It would have had the same net effect.

Q. Would have had the same net effect. But you don't show that in this tabulation.

A. No, I do not.

Q. The first column you refer to as "Net premium funds collected". That would include the premiums that Lotz wrote on that \$61,000 worth of business, that he wrote and placed in AFC, didn't it?

A. If all receivables were collected from the agent, it would be so included.

Q. Well, we assume——

A. (Interposing) Well, I can't assume it, Mr. Garrison, because I know that that is not the fact. Not all agents' balances were collected.

Q. Well, if he collected it, it would be in here?

A. That's right.

Q. So that you have in effect by this exhibit

(Testimony of Alfred R. Marks.)

shown him with the receipts of all premium income collected? [1039] A. That's right.

Q. But you did not give him credit for the \$61,000 of business that he was able to remove from the American Fidelity and place in the Mid-States?

A. It wasn't a cash transaction, sir.

Q. But by this exhibit you are purporting to show the computation of funds, exclusive of Mid-States premiums, available for settlement of account of the American Fidelity? That is what you are attempting to show?

A. That is right.

Q. And you show all premium collections, and yet you do not credit him with the \$61,000 of business that he took off and gave to the Mid-States?

A. That \$61,000 as an element is not included in the schedule.

Q. Isn't that only 50 per cent, then, of his account with American Fidelity, to that extent?

A. I don't know what you mean by 50 per cent, Mr. Garrison.

Mr. Garrison: That is all. Wait, one more second.

Q. Referring to Defendant's Exhibit P, Schedule 12, page 2. This is a statement which you say is, "American Fidelity and Casualty Company with Joe Lotz Agency, Statement of Account, January 1, 1951 to March 31, 1954", and I believe you show a balance due American Fidelity here of \$840.50.

A. That is right.

(Testimony of Alfred R. Marks.)

Q. Well—— [1040]

A. Only with respect to the premiums, Mr. Garrison. That is what this schedule shows.

Q. Well, don't you give him any credit for his earned commissions?

A. No. This is only an accounting for premiums. I didn't—this does not purport, this particular schedule does not purport to show the complete account or all accounts with Lotz. This is only the account——

Q. (Interposing) This just shows what Lotz owes to AFC but doesn't show what AFC owes Lotz.

A. This is only an accounting for premiums.

Q. What would it show if it showed the other half of the picture, what AFC owes Lotz?

A. Well, if this schedule—if I were asked to show a complete auditing with the Lotz Agency of all transactions, then probably the commission element would enter into it.

Q. Who asked for this exhibit?

A. Counsel for AF&C.

Mr. Garrison: That is all.

Redirect Examination

Mr. McKinnon: Q. The purpose of schedule 12, about which you have been last interrogated by Mr. Garrison, was, as I take it, to show the accounting of the premiums by Lotz to American Fidelity and not the full statement of the account? [1041]

A. That is right.

(Testimony of Alfred R. Marks.)

Q. Including whatever may have been owed back to him by way of commissions, is that correct?

A. That is right.

Q. Now, with respect to Schedule 9, about which he has also put some questions to you, this schedule is limited to cash transactions, is it not?

A. That is right.

Mr. McKinnon: That is all.

Cross Examination

Mr. McCallum: Q. Mr. Marks, I assume that in reviewing the records of Mr. Lotz you looked at his check book, did you not? A. Yes.

Mr. McKinnon: If the Court please, I thought this was the last time we would have to go through the formality of my registering my objection to the questions of Mr. McCallum because of lack of foundation for any questions in view of their theory of the case, and ask that the objections run to the entire line of questioning. I hope I won't have to bother Your Honor any more.

The Court: Let the record so show.

Mr. McCallum: Q. And I assume also, Mr. Marks, you looked at the deposit slips among his records? [1042]

A. I am not sure that they were examined, but I think that they were. A lot of this detail work was done by men under my supervision and I would have to refer to my papers to find out.

Q. Now, do you know whether or not the men

(Testimony of Alfred R. Marks.)

you asked to prepare the work that you asked them to do did look at the deposit slips?

A. I am not sure about the deposit slips, Mr. McCallum. I do know that they looked at the check book.

Q. You were advised, were you not, the Public Service monies were a factor in this case, in the course of your examination of his books and records, weren't you?

A. I knew that there was some mention of the Public Service transactions in this case, yes, sir.

Q. And in the course of your investigation, did you not look through Mr. Lotz' records to see what happened to those monies?

A. Well, we made a review of the cash transactions during the period of September 1 down to date in the trustee bank account and in connection with that there was some reference to the Public Service transactions, yes.

Q. Then it's true you did see checks were made payable to the Mid-States Insurance Company and deposited in Mr. Lotz' trustee account, didn't you, in connection with Public Service?

A. I had no way of knowing that the checks were made payable to Mid-States. I saw some deposits reflected in the check book. [1043]

Q. All right, then, my question should be that you did see deposits made in the trustee account of Joe Lotz in connection with premiums received in connection with Public Service matters?

A. I can only assume they were Public Service

(Testimony of Alfred R. Marks.)

matters, Mr. McCallum. We had no indication in the books themselves, in the checkbooks—in the bank statements that we examined. There was no identification of the amounts. But in relating them to the check book, which does give that relativity, why, then, I must assume that the figures contained in the bank statements we examined were settlements on account of Mid-States transactions—Public Service transactions. [1044]

Q. Well, you recall seeing a deposit made involving the check for \$67,500.00 from Public Service, don't you?

A. There was such a transaction reflected in the bank statement and check book.

Q. Now, do you recall at the time that that deposit was made, that sum of that deposit was for about \$68,811.84?

A. I would like to refer to some of my papers, Mr. McCallum.

Q. I say, you found a deposit having been made of \$68,811.84?

A. I don't have a record of the deposits themselves in my working papers, but there are entries, in a schedule that I have recording transactions in the trustee account which are apparently the detail of the transaction you refer to.

Q. Then is it correct, Mr. Marks, that you don't know about the deposit of some \$68,000.00 and what went into that deposit?

A. Well, I know that the cash receipts book reflects on September 14th entries of cash receipts on

(Testimony of Alfred R. Marks.)

account of Public Service transactions, which includes one item of \$67,500.00.

Q. Then your records and your investigation found that on that date, September 14th, of the sixty eight thousand odd dollars deposited some \$67,500.00 came from Public Service?

A. That is right.

Q. Now, on September 14th, and as a result of that deposit, Mr. Marks, how much money was there then in the trustee account of Joe Lotz? [1045]

Mr. McKinnon: If the Court please, in the interests of time, as I recall it the entire set of transactions now being inquired into is in evidence in documentary form. This witness is a mere accountant being asked to verify what he found, and I believe it has already been found and placed in evidence. I wonder if there is any relevancy.

The Court: Maybe you can get a stipulation from counsel in relation to the matters you are inquiring about.

Mr. McCallum: Are you prepared to stipulate, Mr. McKinnon, that on the date the check for \$63,000.00 on September 15th was made and sent to American Fidelity, that the total deposits in that account was \$74,472.99.

Mr. McKinnon: No. I am prepared to say, as I have already said, that I think the routing of monies has already been most thoroughly established by photostats of accounting records in the case, and this witness, being a mere accountant, is merely being asked to verify what he found in those state-

(Testimony of Alfred R. Marks.)

ments. I see no purpose in it except that valuable time is being consumed.

Mr. McCallum: It is preliminary, Your Honor, that if we can reach the conclusion from this witness that as a result of his examination of the records, he found premiums were received in connection with the checks in which the Anglo Bank was involved which were due and payable Mid-States Insurance Company—— [1046]

The Court: Ask him the direct question. Proceed.

Mr. McCallum: Thank you.

Mr. McCallum: Q. I think the question was, did you know how much money he had in the bank account at the time they deposited the \$68,000.00?

A. As a result of the \$67,500.00 going into the account, the balance then became \$74,000.00, approximately.

Q. So that as of September 14th, or 15th, he had \$74,000.00 in the trustee account, of which \$67,500.00 was from the Public Service, is that correct?

A. That is right.

Q. And would you also say that on the day following he sent \$60,000.00 to American Fidelity?

A. There was a check drawn to the account of American Fidelity and Casualty Company in the amount of \$60,000.00.

Q. All right, now, directing your attention, please, to the date of September 24th, did you find at that time a check to American Fidelity in the

(Testimony of Alfred R. Marks.)

amount of \$11,250.00 had been deposited in the trustee account? A. That is right.

Q. In connection with the deposit of \$12,000.00?

A. I can't relate it to the twelve thousand, but I do know about the eleven thousand.

Q. Do those records themselves show what the amount in the trustee account was after the \$11,250.00 Public Service check [1047] had been deposited? A. Approximately \$16,000.00.

Q. Then did you find that on the 26th a check for \$15,000.00 of that \$16,250.00 was sent to American Fidelity?

A. On the 26th a check was drawn in favor of American Fidelity and Casualty Company in the amount of \$15,000.00.

Mr. McCallum: Thank you. No further questions.

Redirect Examination

Mr. McKinnon: Q. Mr. Marks, just one question, please: You made no effort to identify money when you referred to checks being drawn on the Lotz Trustee Account to American Fidelity and Casualty Corporation, do you, as to the source of the funds from which the check is drawn?

Mr. Garrison: Well, if the Court please——

The Witness: A. No.

Mr. Garrison: We submit that is leading and suggestive and almost identifying the witness's answer. The witness testified there went into that account a certain amount of Mid-States money and it went to American Fidelity. Now, if that can't

(Testimony of Alfred R. Marks.)

be identified by that state of facts, then nothing can be. Whether the answer is yes or no, he has said it already.

The Court: Well, that will hardly do.

Mr. Garrison: Well, Your Honor,—

The Court: Let me rule. He may state whether or not he [1048] did as indicated.

The Witness: What was the question again?

Mr. McKinnon: Well—

Mr. Garrison: Can we have it without the leading?

Mr. McKinnon: Yes, I will attempt to reframe it; although my training in leading questions has received some impetus during the course of this trial, if the Court please.

Mr. Garrison: You can thank me for that, probably.

The Court: I always allow for the heat of the moment.

Mr. McKinnon: I thought we were both allowing for Your Honor's long experience in weighing evidence, and taking certain liberties within limits.

The Court: Neither of you gentlemen need apologize for your experience.

Mr. McKinnon: Q. When you refer to a check being drawn on the Lotz trustee account in favor of the American Fidelity and Casualty Company, are you attempting to tell the Court one way or the other whether the funds thus represented are related to any specific prior deposits as with respect to the source of that prior deposit?

(Testimony of Alfred R. Marks.)

A. No, that can't be identified specifically.

Mr. McKinnon: That is all.

Recross Examination

Mr. Garrison: Q. Well, just a minute, Mr. Marks. You said a Mid-States deposit was made of \$67,000.00, didn't you? [1049]

A. I said a check drawn to the order of Mid-States, at least the books indicate as such, for \$67,500.00 was deposited in the trustee account on a certain date.

Q. What date?

A. On the 14th of September.

Q. How much money was in the account then?

A. As a result of that?

Q. No, before the deposit was made.

A. Before the deposit was made there was approximately \$2,000.00.

Q. So then with that deposit and the balance there was \$78,000?

A. That's it. There were other checks came in the same date.

Q. And how much were the other checks?

A. Oh, \$6,000.00.

Q. So we have a total of \$78,000.00?

A. \$74,000.00.

Q. \$74,000.00. Now, when was that check drawn out of there payable to American Fidelity and Casualty Company?

A. The check drawn—I assume you refer to the next check drawn to American Fidelity?

(Testimony of Alfred R. Marks.)

Q. That is \$60,000.00.

A. That \$60,000.00 check was drawn September 15th.

Q. That is the date following?

A. That's the date following. [1050]

Q. And there had to be Mid-States Funds in the \$60,000.00 check because there wasn't enough other money in there, was there?

A. Well, the only thing is that——

Q. Just answer that question.

A. The check——

Q. Answer yes or no?

A. The check for \$60,000.00 was drawn on the day following, at which time there was a balance of \$74,000.00.

Q. And there had to be Mid-States money in that \$60,000.00 check because there wasn't enough money in there to make it up, was there?

A. The \$74,000.00 included \$67,500.00 from Public Service made payable to Mid-States.

Q. Will you answer my question, please?

Mr. McKinnon: If the Court please——

The Witness: A. I can't be more specific than that.

Mr. Garrison: Q. Just answer the question.

Mr. McKinnon: If the Court please, I will object.

Mr. Bronson: He has answered. He said he couldn't be more specific.

Mr. Garrison: Will you read the question, Mr. Reporter? He didn't answer my question. He made

(Testimony of Alfred R. Marks.)

a statement. I want an answer to my question, specifically to the question.

Mr. McKinnon: If Your Honor please, I object to the [1051] question as calling for a conclusion of the witness. The witness is an *account*.

Mr. Garrison: "A mere accountant," he said.

Mr. McKinnon: Well, he is also a human being, and let's treat him as such. He has testified to the influx of money into the *accountant* and withdrawals from the account. To go further involves legal interpretations of the effect of transactions, as counsel well knows, and we should argue that ourselves.

I object to the form of the question as going far afield. The witness has gone as far as any accountant can go in describing the source of funds.

Mr. Garrison: Can I have the question read again?

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

Mr. Garrison: Q. Do you understand that?

A. I understand it.

Q. Is that a fair question?

A. All I can say again, Mr. Garrison—

Q. Just say yes or no, then you can explain it.

The Court: Pardon me. Allow him to answer.

A. All I can say, Mr. Garrison again is that on the day prior to the withdrawal of this check there was a deposit of \$67,500.00, which evidently came from Public Service, which went into the trustee account. As a result of that deposit [1052] there

(Testimony of Alfred R. Marks.)

was \$74,000.00 in the account. After that deposit and after that balance, the next transaction is a check for \$60,000.00 made payable to American Fidelity and Casualty Company, which was drawn on the following day.

Mr. Garrison: Q. And that's as explicit as you can be about whether or not there was any Mid-States money in the \$60,000.00 check payable to American Fidelity?

A. That is the only relationship I can give you on it.

Q. You can't give a yes or no answer?

A. No, sir.

Q. Now, referring to Defendant's Exhibit O—here, I will show the exhibit itself and you can have it before you. A. All right.

Q. In your third from the last column on the right—— A. Yes?

Q. ——you said——

Mr. Garrison: This is the schedule, Your Honor, which shows, presumably, or rather it is purported to show a computation of funds exclusive of Mid-States premiums available for settlement of account with American Fidelity and Casualty Company.

Mr. Garrison: Q. Is that right?

A. That is the title of the schedule.

Q. Now in the third from the—fourth from the right column—— [1053]

A. Fourth or third from the right?

Q. Fourth from the last. You take "Portion of

(Testimony of Alfred R. Marks.)

Operating Expenses and Drawings Allocated to AF and C Operations" and that you make as an arbitrary assessment, I take it.

A. It isn't arbitrary.

Q. Well, based on some formula?

A. May I explain?

The Court: Pardon me. What is it?

The Witness: A. The method of arriving at the figure contained in this column are reflected on page 3 of that schedule, in which we used a formula which is customary to the industry in developing allocations of expenses between departments or between writers of business, and so on.

Mr. Garrison: Q. So that what you did there was to use this formula to allocate and charge to the American Fidelity their proper share of the cost of running the agency, is that right?

A. That is right.

Q. And you found that to be some per cent of the total cost of running the agency?

A. That is right.

Q. Then you deducted that from funds available? A. That is right.

Q. And found that the balance of it was all due and available—or not due, but all available to pay American Fidelity and [1054] Casualty Company's account?

A. For the purposes of the schedule, yes.

Q. I am not talking for the purposes of the schedule. I am talking about that you deducted the portion you charged AFC's business with and then

(Testimony of Alfred R. Marks.)

found that all the funds available remaining—all funds remaining were available to pay AFC's account.

A. That's right. On the theoretical basis referred to in the schedule.

Mr. Garrison: That is right. Step down.

The Court: Step down.

(Witness excused.)

The Court: Take a recess.

(Short recess.)

FAYE PODESTA

a witness called on behalf of the plaintiff in rebuttal, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: State your name to the Court.

A. Faye Podesta.

The Clerk: Will you spell your last name, please?

A. P-o-d-e-s-t-a.

Direct Examination

Mr. Garrison: Q. What was your maiden name?

A. Faye Roach.

The Court: Spell that last name.

A. R-o-a-c-h, unfortunately.

Mr. Garrison: She asked me how you spell your name, Your Honor, when I asked her to come up here.

Mr. Garrison: Q. May I call you Miss Roach for the purpose of this interrogation?

(Testimony of Faye Podesta.)

A. Yes.

Q. No offense, Mrs. Podesta.

Were you employed in 1951 at the Lotz Agency in Oakland? A. Yes, sir.

Q. What was your position there?

A. Bookkeeper.

Q. Were you head of the bookkeeping operations? A. Yes, sir.

Q. How long were you employed?

A. I was hired there June 3rd, I think, 1951, until December, 1951.

Q. And how many girls did you have?

A. Three.

Q. Do you remember in August of 1951, Mr. Hart, the president of the American Plan, coming to Mr. Lotz' office? A. Yes, I do.

Q. And did you see him there?

A. Yes, I did. [1056]

Q. Did you receive a request from anyone in connection with any of the figures involved in Mr. Lotz' insurance operation at that time?

A. You mean in July?

Q. In August.

A. In August, I mean. Yes.

Q. And from whom did you receive the request?

A. Mr. Smead.

Q. Ralph Smead? A. Yes.

Q. And what did he ask you? What did he say to you and what did you say to him?

A. Well, he wanted the outstanding balance of accounts receivable and accounts payable.

(Testimony of Faye Podesta.)

Q. And that would be the sums due from agents to Lotz and the amounts Lotz owed the companies?

A. Yes.

Q. And what did you do after you had that conversation?

A. Well, we proceeded to get the figures for Mr. Smead.

Q. And who was present when he asked you that? A. I am not sure.

Q. Who were the girls employed in the same department there at that time?

A. Miss Lyla Bowman, Janice Howard, and Garnett—I can't remember her last name. [1057]

Q. Janice Howard is the girl that was in here earlier this morning? A. Yes, sir.

Q. Did you speak to those girls regarding this request? A. Yes, sir.

Q. And did you yourself work on the project?

A. Yes, sir.

Q. And what part of it did you work on?

A. I think I worked on both accounts receivable and payable.

Q. And what part did Miss Howard work on?

A. Receivables.

Q. And who worked on the payables other than yourself? A. Mrs. Bowman.

Q. And did you get any instructions or requests from Mr. Smead during the time this work was going on?

A. Well, it was quite urgent.

(Testimony of Faye Podesta.)

Q. Just answer the question whether you got some instructions or requests from Mr. Smead.

A. Well——

Q. Answer that yes or no and then I will ask you what that was. A. Yes.

Q. What did he say to you?

A. They were in a hurry for the figures.

Q. What did he say to you? Not his exact words, but the [1058] substance?

A. Well, Mr. Hart was sort of impatient.

Q. You have to give the words that were said.

A. I don't remember.

Q. Can you remember the substance of it?

A. No, I don't.

Q. Had something to do with when you were going to get the work finished?

A. How soon could we finish the work, yes.

Q. Do you have any recollection how long it took to get these figures together?

A. I don't think it could have taken more than a day.

Q. And what did you do? Well, what was the nature of the work you completed? What form was it in? A. Typed form, you mean?

Q. Yes. What kind of paper? What do you call it?

A. Gee, I don't understand the question.

The Court: You are getting along all right. If you don't understand the question, you tell him.

Mr. Garrison: Some of the questions are pretty bad, I admit.

(Testimony of Faye Podesta.)

Mr. Garrison: Q. What kind of work were you doing? What were you seeking in this work?

A. The outstanding balance.

Q. Total of it? [1059]

A. Total of the outstanding balance.

Q. How did you compute them? What kind of machine? A. Adding machine.

Q. Then what did you do? Give Mr. Smead, when you finished, those additions?

A. We have him a copy of—I think we listed all the accounts by name of receivables and the balance and had a typed copy of all that for him.

Q. Did you give him a paper with your adding machine tape on the accounts payable?

A. The tape?

Q. Yes. A. Yes.

Q. And you didn't have any direct contact with Mr. Hart at the time? A. No.

Q. Your dealings were with Mr. Smead? Some-time after this——

Withdraw that.

Did you have a conversation with Mr. Smead when you gave him the material?

A. In all probability.

Q. Well, did you have any conversation with him regarding how well you had done in the assignment? A. He usually——

Q. No, I am talking about this particular occasion. You just [1060] gave me an answer a moment ago you had some conversation with Mr. Smead

(Testimony of Faye Podesta.)

when you finished in respect to his request during the time the work was going on.

A. Well, I don't remember.

Q. After this event occurred, did you have a request from someone in the month of December to sign something in connection with the work you did?

A. Yes, sir.

Q. And did you sign something?

A. Yes, sir.

Q. I will show you Plaintiff's Exhibit 22 and ask you if you—which is a photostatic copy of a paper, two sheets of paper—and ask you if you have seen that before, seen the original of that before?

A. Yes, sir.

Q. And what is it?

A. I beg your pardon?

Q. And what is that?

A. Well, this is just a statement that Janice Howard and Lyla Bowman and I witnessed, well, everything that occurred on August 20th, the figure we made up for Mr. Hart.

Q. In other words, this is a statement covering the subject matter of your testimony?

A. Yes.

Q. Who asked you to sign that? [1061]

A. I don't remember.

Q. And were you present when the other girls signed?

A. Yes, we were altogether.

Q. At the Lotz Agency office? A. Yes.

Q. You were still employed there at that time?

A. Yes.

(Testimony of Faye Podesta.)

Q. And this was signed about in December, and the event occurred in August that you have referred to.

Now, I show you Plaintiff's Exhibit 40 and ask you if you have seen that before? That is a copy of—apparently a carbon copy? A. Yes.

Q. Did you type that statement?

A. I don't know whether I did or Mrs. Howard.

Q. Can you look at that list and from your knowledge of the Lotz accounts tell us what that is?

A. Well, this is a list of all the unpaid items. This is the list of all the American Fidelity unpaid items. [1062]

Q. In other words, those are balances due from sub-agents? A. Yes, that is right.

Q. Can you tell us whether or not that is the list that was given Mr. Smead as a result of his request?

A. Yes, this is the list. I wouldn't have signed it if it hadn't been.

Q. I see that there is something written at the bottom there. Is that your writing?

A. Yes.

Q. When was that written?

A. I don't know the exact day.

Q. Approximately?

A. I imagine around December.

Q. That was probably written about the same time as the other document that we have identified?

A. Yes, in all probability.

Q. And this writing is yours, is it?

(Testimony of Faye Podesta.)

A. Yes.

Q. Do you remember on how many originals and copies, if any, you did write this on?

A. No.

Q. This writing says:

"This is a copy of the recap of all American Fidelity and Casualty Company's unpaid items, as per Ralph Smead's request August 20, 1951. Copy [1063] of statements were given to Mark Hart. Signed Faye Roach"

As I understand your testimony, you didn't actually see any of these documents given to Mr. Hart? A. No.

Q. But can you tell, independent of this notation on the bottom, by looking at this list whether or not it is a list of the accounts receivable on Lotz' books at that time of AFC balances.

Mr. Bronson: At what time?

Mr. Garrison: Q. At the time the tapes were run, August 20th.

A. You mean, in other words, these accounts that—. Yes, these are them.

Q. They are familiar to you by name?

A. Yes.

Q. The amounts, I assume, would not be?

A. No.

Q. Do you have any independent recollection of the total of these accounts receivable when you made them up that day and gave them to Mr. Smead?

(Testimony of Faye Podesta.)

A. No. The figure didn't mean anything to me at the time.

Q. I understand that. You say you did not type this material here?

A. I am not sure whether I did or didn't. [1064]

Q. Are you a typist of sorts?

A. I try. Well, I type.

Q. And do you recall when you first saw this list, this tabulation, where you were?

A. Would you repeat that?

Q. Do you recall where you were when you first saw this particular list of agents and balances?

A. You mean at the time they were made up?

Q. No, at the time you first saw this paper.

A. This particular paper?

Q. Yes. A. You mean——

Q. When you wrote—very first time you saw it, do you remember where you were?

A. In the office. Do you mean when it was made up? In the office.

Q. You don't recall the particular act of typing it up yourself? A. I can't remember.

Q. And the recollection you have that is most distinct in the writing out of a memorandum at the bottom? A. Yes.

Mr. Garrison: Cross examine.

Mr. Bronson: Well, Mrs. Podesta, it will make you nervous to be cross examined. I am not going to cross examine. [1065]

The Witness: I am much better now.

(Testimony of Faye Podesta.)

The Court: All right, you may step down.

(Witness excused.)

Mr. Garrison: I now call Mr. Horton.

E. W. HORTON

a witness called on behalf of the plaintiff in rebuttal, being previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified further as follows:

The Clerk: Mr. E. W. Horton to the stand, heretofore sworn.

Direct Examination

Mr. Garrison: Q. Mr. Horton, have you reviewed the exhibits that were introduced yesterday by Mr. Marks? A. I have.

Q. Will you keep your voice up, please?

Calling your attention to Exhibit O, do you have that before you?

A. Which is Exhibit O?

Q. That is the Schedule 9.

A. I have it.

Q. Do you note that the items in column number 2 consisting of the \$111,133.00 total were taken as of the end of the month?

A. Column 2? [1066]

Q. Yes.

A. That is the total of commissions and other income for the period here indicated.

Q. Yes. And the figure was taken as of a given date, were they not, in each case?

(Testimony of E. W. Horton.)

A. Well, on page 2 of the schedule it shows the different months in which it accrued.

Q. Yes. On page 1 it also shows the amounts after December, 1951? A. That is right.

Q. And are the computations made as of the end of the month? A. That is right.

Q. That is what I was trying to get. Will you explain to the Court your opinion of such a tabulation, taking the figures as of the end of the month, in determining the amount of funds due at any given time in relation to the amounts of money owed?

A. Well, in determining those things you must include the total receipts in a given month to indicate how well you can pay the account——

Q. Why?

A. To show the flow of cash coming in and cash going out.

Q. In other words, you have to take the total amount of money the man had during the month and know his ability to pay his bills? [1067]

A. That is correct.

Q. If he had here in December \$5,005.00, he might have had more or less all the balance of that month, all previous days of the month.

A. That is correct.

Q. So that it is your opinion there is no relationship to the amount of money in his account as of a given day when comparing his ability to pay his statements for the whole month?

(Testimony of E. W. Horton.)

A. The ability to pay should be based on the total flow of cash coming into the depository.

Q. Is that the way you made your statement of the Lotz account?

A. Well, in my statements I showed the total cash received by months.

Q. The answer is "yes"? A. Yes.

Q. Now, calling your attention to column 4, which is the "Portion of Operating Expenses and Drawings Allocated to AF and C operations", do you see that? A. I do.

Q. And apparently from this tabulation Mr. Marks had charged AFC's portion of the cost of running the agency at \$47,669.00.

A. That is correct.

Q. And the balance of the income is available for payment of AFC accounts? [1068]

A. Approximately \$64,000.00. That is the difference between \$111,000 and \$47,000.00.

Mr. Garrison: I wonder if I could pass this up, Your Honor? I am sorry I was holding it here. I don't need it. This is an important point, if Your Honor would——

The Court: Well, let me try and follow this testimony.

Mr. Garrison: Yes, that is what I want.

The Court: In respect to the last two items counsel inquired about, in what respect do you differ from the other?

The Witness: A. So far as the amounts are concerned, we don't differ.

(Testimony of E. W. Horton.)

Mr. Garrison: Q. All right, there is no dispute with the totals in the column? A. No.

Q. It is the use of those totals that you have some disagreement with? A. That is correct.

Q. Calling your attention to this fifth column over from the left, "Portion of Operating Expenses and Drawings Allocated to AFC Operations", that is \$47,000.00? A. Correct.

The Court: Wait a minute.

Mr. Garrison: Fourth column from the left. \$47,669.00.

Mr. Garrison: Q. And that is the portion of expenses that was charged to American Fidelity?

A. That is correct.

Q. And they arrived at that by taking all of his net premiums and his commissions from other sources? A. \$47,000.00?

Q. No, I mean the \$47,000.00 refers to AFC's portion.

A. Forty-seven thousand refers to AFC's allocation of the total expenses.

Q. Yes. And how did they arrive at that?

A. On page 3 they show how they allocated the expenses to it.

Q. They used a formula?

A. Used a formula. It is on page 3 of schedule 9.

Q. After taking the portion out that was chargeable to AFC, what did they do with the balance of the amounts paid for overhead expense?

A. From the \$111,133.00 they deducted the \$47,000.00, which left \$64,000.00 of commissions and

(Testimony of E. W. Horton.)

other income as funds theoretically available for the payment of amounts due to AFC.

Q. And why isn't it a reasonable thing to do that?

A. Well, I was applying this same theory to Mid-States Insurance Company, and then carried it further that we would apply this same theory to each and every company in which he was doing business, and it seems that using the \$111,000.00 and deducting \$47,000.00 for expenses allocable to AFC, we [1070] have \$64,000.00 in funds which we can apply to AFC.

Now, using this same statement and inserting the \$55,000.00 as allocable to Mid-States, you would have approximately \$56,000.00 in funds available to apply to payments of Mid-States, theoretically.

Then carrying that a step farther and using the other companies there, and putting in the \$111,000.00 in the column as it stays, and applying \$22,000.00 as expenses for the other companies, leaves available \$89,000.00.

When you take and add the three amounts available to these various companies, it aggregates \$209,000.00, where we only had \$111,000.00 as other income to apply.

Q. That's a good start, but let's back up and run over it again. I think I know what you mean, but it is very hard to follow.

They took the total cost of running the agency, didn't they? A. That is correct.

Q. And then Mr. Marks said that, "in order to

(Testimony of E. W. Horton.)

see who should pay the cost we will divide it up among the companies”?

A. That is correct. [1071]

Q. “We have a formula. We will allocate it to the entire proportion of AFC and allocate a proportion to Mid-States.” At least at this point they have, of course, allocated a portion to AFC?

A. That is correct.

Q. And in this statement they assume that after allocating AFC’s portion, all the balance is available to pay AFC’s balance.

A. \$64,000.00, that is right.

Q. And under this exhibit or schedule, where did the money come from to pay the other company’s portion?

A. The \$64,000.00 on this schedule, all of it is applied to AFC.

Q. In other words, they charge AFC’s account with the portion of the expense, and then say all the balance of the money is available to pay AFC’s account?

A. That is right.

Q. There would be nothing available to pay the portion of the other companies?

A. That is right.

Q. So that if you went through that same way, following this same thing, and applied this theory to all the companies that AFC has done here, and did the same thing for Mid-States and the same for the other companies, you would have to have how much did you say? [1072]

A. Well, the applicable funds then would be

(Testimony of E. W. Horton.)

\$209,000.00 that we would be theoretically applying to each of these companies on this basis, as I see it.

Q. This thing assumes that once AFC's portion of the overhead is charged them, all the rest of the money is available to pay their account with.

A. That is the way this schedule is prepared.

Q. But it actually only deals with a portion of the total expenses necessary, isn't that right?

A. I don't quite understand the question.

Q. Well, the total—a representative figure, we will call 100% for expenses of running the Lotz Agency.

A. Yes.

Q. And they have charged some portion to AFC?

A. Thirty-eight per cent, it works out.

Q. Sir? A. Thirty-eight per cent.

Q. So the balance, they say, was available in funds to pay AFC's account with?

A. The balance after deducting \$47,000.00 from the \$111,000.00, \$64,000.00 all is applicable here to AFC.

Q. If they paid AFC, the creditor, in effect, the sixty-four thousand, others would be holding the bag?

A. I don't exactly know what you mean by that, but all I can say is that all these funds, \$64,000.00, have been applied to [1073] a theoretical amount of cash available for AFC.

Q. Certainly. If they had used the balance of \$64,000.00 and paid it on AFC's account, the creditors of Lotz to run his agency, rent, lights, gas,

(Testimony of E. W. Horton.)

water and payroll—would have gone unpaid because the money had all gone to AFC.

A. I guess you could assume that.

Q. Well, certainly. Now that, he says in the next column, is the net funds theoretically available to remit to AFC.

A. In the third column?

Q. The one following the one we are talking about, the net funds theoretically available.

A. Right.

Q. I assume he means those funds would have been available if something else hadn't happened.

Mr. McKinnon: That calls for a conclusion of the witness, and I object to it.

The Court: That may go out.

Mr. Garrison: Q. Let's see what actually did happen in the period involved.

Mr. Bronson: We are not dealing in theories, but dealing in facts.

The Court: We are on the fifth column?

Mr. Garrison: Yes. "Net Funds Theoretically Available to Remit to AF & C."

Mr. Garrison: Q. And that is the column that shows how [1074] much would be available if they took all the money Lotz got and only paid AFC's portion, and used the balance of the funds that would have otherwise gone to pay his bills and paid it on the AFC account, is that right?

A. That is right.

Q. That is a theoretical chart, isn't it?

A. Schedule 9?

Q. Yes. A. It assumes certain things.

(Testimony of E. W. Horton.)

Q. Let's find out, without assuming anything, just what the cold, hard facts are. Take the period of—take the months of July, August and September. Can you tell us what funds Lotz got in actual dollars, not assumptions of what he got, who he got it from, and what he did with it?

A. During the months of July, August and September, 1951, premium collections totalled \$278,731.00, of which \$125,516.00 was for Mid-States, \$129,280.00 was for American Fidelity, and there was \$7,000.00 transferred from the operating account, and \$16,934.00 received from other sources, totalling the \$278,731.00.

Q. All right, now, during those three months period he got in two hundred seventy-eight thousand? A. That is correct.

Q. How much did he get on account of business written in Mid-States? [1075]

A. \$125,516.00.

Q. How much from business written in American Fidelity? A. \$129,280.00.

Q. Those are approximately the same—one hundred twenty-five and one hundred twenty-nine?

A. That is correct.

Q. Now, that's what he got in from his agents for business written in that period?

A. They are the actual collections, right.

Q. What did he do with that money?

A. During that same period he paid to Mid-States Insurance Company \$2,812.00.

Q. What did he do with the balance?

(Testimony of E. W. Horton.)

A. He paid \$198,937.00 to American Fidelity, and he transferred \$34,200.00 to his operating account, and paid to others \$39,265.00, or a total of \$275,215.00.

Q. And you have here in writing what you have just given us? A. That's correct.

Mr. Garrison: I ask that this be received in evidence.

The Court: It may be admitted and marked next in order.

(Whereupon document entitled "Joe Lotz Insurance Agency, Summary of Receipts and Disbursements Months of July, August and September, 1951" was received in evidence and marked Plaintiff's Exhibit 41.)

Mr. Garrison: Q. You say he took out and put into his [1076] operating account \$34,200.00?

A. I think that is the figure. It is right there.

Q. And he paid to others—other companies, is that right?

A. Other companies. Other disbursements. Mostly other companies, I would say.

Q. \$35,000.00? A. That is correct.

Q. So that the difficulty, I take it, with this Schedule 9, Exhibit O, is that Mr. Marks has overlooked in figuring what would be available to pay AFC's account, these two items of withdrawals by Lotz to pay other companies and to pay his own operating expenses.

Mr. McKinnon: If the Court please, that is objected to as calling for a conclusion of the witness.

(Testimony of E. W. Horton.)

This entire line of interrogation goes to a legal interpretation of accounting facts, all of which facts are clearly set forth in the record and undeniable.

Mr. Garrison: I withdraw the question.

Mr. Garrison: Q. We were talking a moment ago about Lotz' bank account, and are you familiar with that? A. Yes.

Q. You had available to you the bank statement, didn't you?

A. This bank statement? Yes.

Q. Did you?

A. Yes, I have had this. [1077]

Q. Just keep it. And do you see the deposit in there of \$67,000.00?

A. There is a deposit in here of, I think that's \$67,500.00 here is part of this original deposit of \$68,811.00.

Q. There was one check for payment on which it was stopped and then they issued another check?

A. Yes.

Q. But forgetting about that, do you find a deposit there of \$67,000.00? A. That's right.

Q. How much was in that bank account when that deposit was made?

A. On September 17th, after that deposit there was \$74,253.00.

Q. That isn't what I asked you. How much was in the bank before that deposit was made?

A. On September 13th there was on deposit \$2,079.00.

(Testimony of E. W. Horton.)

Q. And do you know where that \$67,000.00 came from?

A. The records indicated that they were collections from Public Service.

Q. All right. Do you find that after that \$67,000.00 was deposited there was a \$60,000.00 check drawn?

A. Here's a charge of \$67,000.00.

Q. And do you know that there was such a check drawn from your study of the books?

A. I do. [1078]

Q. Do you know who got the money?

A. The check was made payable to American Fidelity.

Q. You don't have to refer to your notes. You know that. It was deposited in their account, wasn't it, in the Central Bank?

A. I believe the endorsement bears their name.

Q. Certainly. And can you give us a yes or no answer on whether or not the \$60,000.00 check drawn on that account had to include some of the Public Service money?

Mr. McKinnon: Well, if the Court please, here's a conclusion again. I think this record of the influx and outgo of funds appears so clearly established by documentary evidence that there is no present inquiry need be made, and this is a legal argument which counsel will be most eloquent on and we will try to be eloquent on in response when the proper time comes.

Mr. Garrison: I think it does speak for itself.

(Testimony of E. W. Horton.)

It is elementary and it is perfectly clear. I won't burden the Court.

No further questions.

Mr. McKinnon: If the Court please, I'm not going to cross examine the witness at all. I'm going to wait now and argue legally.

The Court: Step down, sir. (Witness excused.)

Mr. Garrison: That is the Plaintiff's case. It is not [1079] quite twelve o'clock, Your Honor, and I would like the record to show we have met our schedule here.

Mr. Bronson: Have you gentlemen any more?

Mr. Kakures: None.

Mr. Bronson: We have a motion to dismiss the action, if the Court please, against the two corporations, American Plan and American Fidelity and Casualty Company. I prefer to state the grounds and make the argument on that at the time that the argument is set on the case generally on its merits—next Tuesday—if that is agreeable to counsel and agreeable to Your Honor.

The Court: Very well.

Mr. Bronson: That will terminate the proceedings, and we rest on the defense.

The Court: Both sides rest? Now you have Saturday, Sunday and Monday to prepare yourself and that will give you a full opportunity to do full justice to your cause.

Mr. Garrison: Thank you.

The Court: We will take an adjournment until 10:00 o'clock Tuesday morning.

Mr. Bronson: Before Your Honor leaves the bench, I have spoken to one or two counsel but not to Mr. Garrison. Because we didn't keep an index record by exhibit number of the exhibits here, we would like to have the privilege jointly with all counsel of withdrawing from your Clerk all the exhibits [1080] in this case, and then I am sure we can arrange with Mr. Garrison if he needs to look at them a division in the intervening time.

The Court: Then evidently it is agreeable to all to have all these available to all parties in interest?

Mr. Garrison: Yes.

Mr. Kakures: So stipulated on our behalf.

The Court: Very well.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. on Tuesday, May 18, 1954.)

ARGUMENT ON BEHALF OF THE PLAINTIFF

Mr. Garrison: If Your Honor, please we filed at the beginning of this case a so-called trial memorandum in which we outlined very briefly the issues in the case, what we thought the evidence would prove, and I made an opening statement at the beginning of the case as to what we thought the evidence would prove. We stand on both that statement and the trial brief as we presented it.

The action, of course, as we have heard these two weeks now, is one by the plaintiff for damages because of certain acts of the defendants Lotz and Smead and defendants American Fidelity and Cas-

ualty and the American Plan. Those damages in the actual out-of-pocket sense are \$281,746.00. There is no dispute as to the fact that the plaintiffs are out of pocket that much money. The issue arises as to whether or not all of the defendants are liable, and if so, whether they are all liable in the same amount.

There is a cross-claim, as Your Honor knows, by Mr. Lotz, which I shall not deal with. There were three cross-claims by defendants American Plan and American Fidelity, two of which have been abandoned, and a third cross-claim is one which says in effect that if we got some of your money, we are entitled an offset because some time previously you got some of ours. [1082]

I do not regard this case as a case involving the serious questions of law. I think it is a question of fact case. We think there are four pivotal points in the case dealing with the question of facts and evidence. The first, we think is the question of Mr. Lotz' insolvency.

The second is the fact of his agency with the plaintiffs and his breach of his fiduciary obligation as an agent.

Thirdly, we think, so far as the defendants American Plan and American Fidelity are concerned, the pivotal point is the knowledge that Mr. Hart as their representative had of the fact of Mr. Lotz' agency and his fiduciary relationship and his breach of that duty and relationship and his participation in it.

Fourthly, we think there is a question of the loss

by the plaintiffs. I will try to tie in the evidence with these four key points as I go along, and I think the evidence supports the existence affirmatively of those points, the plaintiff is entitled to recover against all of the defendants.

One section of the evidence that I think is important and persuasive is the group of statements that were taken by the plaintiffs in this case and that were given by some of the defendants in the case. I think they are important not only because of their contents but because of the varied ways in which they were prepared and the circumstances surrounding their preparation. Your Honor will recall that the first one was the [1083] one that was prepared by Mr. Smead on December 6, which consists of ten pages, which carries in it a number of changes, corrections, and which is signed not only by Mr. Smead himself but also by Mr. Lotz, and whose signatures were acknowledged by Mr. Lotz' attorney.

The second statement is a supplement to that statement which was prepared the next day by Ralph Smead, and which furnishes details not previously included in the main statement. Then on the same day Mr. Lotz, who had not completed a full statement on his own behalf, supplemented Mr. Smead's statement as of December 6, and this he wrote out in his own hand, carried down to Santa Monica, where he had a meeting with Mr. Titus and Mr. Hatfield, and delivered his supplement to Mr. Smead's statement there.

Then there is the statement of December 8th,

which is three pages, signed by both Mr. Smead and Mr. Lotz, and which likewise furnishes additional data not theretofore contained in the original statement.

And then there is the very significant letter dated November 27th, which is signed not only by Mr. Lotz and Mr. Smead, but also by their attorney, Mr. William B. Mead, and this letter says:

“As far back as last July I had been losing money and was unable to pay my account to American Plan Corporation and other debtors, and it became [1084] necessary for me to use trustee funds in the operation of my business. By August 31, 1951 I was insolvent to the extent of \$100,000, and where I should have had approximately \$190,000 in a trustee account, there was only \$4,000 in hand and in cash and in banks. The American Plan Corporation was insistent that I make a payment on my account, so I made arrangements with the Public Service Insurance Company to pick up approximately \$133,000 of insurance. I paid them a 25 per cent commission for the business, which amounted to approximately \$32,000 and received from them the net amount of \$100,000. I wrote the insurance up in the Mid-States Insurance Company, but instead of leaving it in the trustee account for Mid-States, I paid this money to American Plan on their bill. I still owed them around \$60,000, and so around the first of November I made arrangements with the American Plan to cancel about \$60,000 worth of insurance I had written with them but had not paid for, switching this over to Mid-States. The

result is that I am now unable to pay my account with you, which will be due December 1."

And the last statement, and the one which I personally [1085] have more interest in than any other, is the one that was taken in my office, and at which, you will recall, Mr. Smead and Mr. Lotz testified that several hours was consumed in the discussion and the dictation and the transcription and the corrections, and I will call Your Honor's attention to the fact that in this statement there are, I would estimate, at least ten pen and ink changes which each of them made, and which each of them initialed, and this statement ties together all of these other statements and supplements and brings into one document all of the facts that were piecemeal included in the previous ones.

So we have these statements without background, and to me it is highly significant that they were made available in that way, and likewise they are exceedingly important because of their contents.

I would just like to take this statement of Mr. Smead's, which was the first one prepared, prepared by him in his own hand, written at great length and considerable effort, with a number of changes and corrections, and which was in their opinion sufficiently valid to involve signature before their attorney, and point out to you that in this statement, which incidentally was denied in detail by Mr. Hart,—you will recall Mr. Bronson took him step by step through this statement, and whether he denied it all or not I do not know, but he denied a great deal of it, and thereby raises the

issue of these [1086] statements. Let us see what the statements say and what are the facts, and I am not going to labor the question of whether the conversations occurred because as to those there is a clear conflict. But let us take the things in the statement that we can relate to either performance of fact or other undisputed documentary evidence. The first thing the statement says is that they owed the American Plan some \$247,000 in August of 1951, and that they had a check returned from the bank unpaid for \$50,000, and they also owed a balance to American Plan of \$7,000. Well, now, those facts are admitted by Mr. Hart. There is no dispute about those facts. They were called to New York and they had a meeting there. No dispute. They were asked specific questions in New York and those questions and those answers Mr. Smead wrote out in the form of question and answer, question and answer, question and answer. I will read that part on page 3.

He says:

“Numerous questions were raised by Mr. Hart and Mr. Feller pertaining to the finances of the agency. Specific questions were asked of me.

“Question: Amount of premiums owed companies?

“Answer: Approx \$250,000 American Plan, \$29,000 Mid-States, \$10,000 miscellaneous companies.

“Question: Amount of receivables?

“Answer: Approximately \$75,000. [1087]

“Question: What happened to the monies collected:

“Answer: Payment of advance commissions and operating costs.”

Then it says:

“Various questions were asked by American Plan pertaining to the use of money by Joe. Questions were raised as to how we anticipated to pay accounts.”

There was a dispute at that point as to whether or not the amount of receivables that they had coming, that Lotz had coming from American Fidelity sub-agents was \$75,000.00 as Mr. Smead says he told them, or was \$150,000.00, as Mr. Hart says he told them.

Let us pause there for a minute and check to see the significance of that disparity in amounts. If the amount of money coming from sub-agents to Lotz because of American Fidelity business was \$150,000.00, it would have been more reasonable than for Mr. Hart to expect Lotz to go out and collect that money to pay his account without having to invade premiums of other companies, because he had \$250,000.00 coming. He could get \$150,000.00 from sub-agents on their business, then they would only have to borrow \$100,000.00, which he says was the loan in discussion. But if the figure was \$75,000.00, which Mr. Smead says he told them it was, then of course, it [1088] would be quite unrealistic to think that he could collect that \$75,000.00 from sub-agents to pay his account in another month or two by raising the difference between \$75,000.00 and \$250,000.00. It would be far better for Mr.

Hart if the figure had been \$150,000.00 and that is the way he says he heard it.

Let us test that clear conflict out against the facts in the case that are undisputed. And I think it presents a striking coincidence, because the auditor who audited these books after the event found that actually, as of that date, the accounts receivable was \$90,000.00, not \$150,000.00. \$90,000.00. Miss Howard, who worked in the office of Mr. Lotz, who made up the very tabulation at Mr. Smead's request of the agent's balances of American Fidelity, Plaintiff's Exhibit 40, totalled the agent's balances at \$71,642.00. Mr. Hart, himself, when he wrote his interoffice communication, not more than sixteen days later, told his own treasurer that there was \$70,000 of accounts receivable, and this is to me very significant, and this is the letter of August 29th addressed to Mr. Will, the Treasurer, from Mr. Hart himself, and in it he says, "At present writing there are premiums outstanding of \$70,000.00 due Joe Lotz from sub-agents and applicable to policies of the American Fidelity and Casualty," and he instructed Smead to either effect collection within a reasonable time or, failing to do so, cancel the individual policies for non-payment of premiums. In any [1089] event we are assured of an additional \$70,000.00 credit either by cancellation or collection.

Now, it is true that between the New York meeting and this letter he had been out to Oakland and had picked up, I think he said, some \$20,000.00 in premiums from Lotz, and to that extent that \$20,-

000.00 might be added to the \$70,000.00 which would bring us to Mr. Horton's figure of \$90,000.00. But in none of these pieces of evidence which come now to stand out in very clear relief when the atmosphere is clarified and the dust is down, not in any one of those has the figure ever gotten anywhere near \$150,000.00 or \$140,000.00.

So we will pass the question of whether or not Mr. Smead told him it was \$75,000.00 or \$150,000.00. You will remember Mr. Hart said when he came out to Oakland Mr. Smead said it was \$75,000.00 and he pointed out to him it could not be \$75,000.00. It had to be \$150,000.00, and Smead said, "Oh, yes, I guess that is right."

Mr. Hart also denied that in the New York meeting he asked what balances were owed other companies and what had happened to the money and what generally was the financial condition of the Lotz agency. I am going to pass that one over a minute because I think it is a little more significant to discuss it when we get them out to Oakland at the Oakland meeting. They did discuss, however, how they were going to [1090] pay the account off and what their plans might be for settling the American Fidelity and Casualty account. Mr. Smead says they discussed getting another company writing a substantial volume of business and using the premiums from that writing to pay the American Fidelity account, and the meeting adjourned on that note.

What did they do? We submit that the evidence shows that they did exactly that. Mr. Lotz immedi-

ately departed for Chicago and worked out a new, better arrangement with Mid-States on the basis of assuring them of an increased volume of business. Mr. Smead immediately returned to Oakland for the purpose of making collections on the account. They fortuitously ran across the Public Service Company, who was in difficulty because of surplus limitations, and who had to get rid of some of its business, so instead of going out and beating the bushes for a volume of business, they found it in one central spot and they were able to take that as a wholesale transaction and transfer it in a block off of the Public Service books onto the Mid-States books. It cancelled at first the Public Service policies and then they wrote new policies in the Mid-States—just exactly what Mr. Smead says was the plan when they were in New York. And then what did they do? They took the money they got from Public Service and they paid it on the American Fidelity and Casualty Company. Just exactly what Mr. Smead said they were going to do. [1091]

Now, there is another little significant conflict here. Mr. Smead said they were talking about a \$50,000.00 loan when they were in New York. Mr. Hart said they were talking about a \$100,000.00 loan. That is only significant because if the loan were \$100,000.00 it would just wash out the American Fidelity and Casualty account completely, assuming Mr. Hart's first figure of \$150,000.00 of balances due in the agent's and the \$100,000.00 loan, that is the \$250,000.00 that would be needed to pay the American Fidelity and Casualty, and then of course there would be no invasion of

any one else's funds, and there would be no necessity for being involved in any question of someone else's money. But oddly enough, Mr. Smead says that they talked about \$50,000, and oddly enough, Mr. Feller says when he came out to Oakland, went to the bank and tried to make the loan, he was trying to make a \$50,000.00 loan. At any rate it was exactly what Mr. Smead said they were going to try to do, and that is exactly what they tried to do.

The statement then goes on to recount that Mr. Hart and Mr. Feller—I think it was seven days after the New York meeting—came flying out to Oakland. And bear in mind Mr. Hart was never concerned about Lotz' account. He knew it could be easily liquidated. He knew they had these large balances in the hands of agents. He had to borrow some money from the bank. He was not concerned. It was a routine matter. [1092] But within seven days, and even before the seven days, Mr. Will, the Treasurer, teletyped Mr. Smead and Mr. Lotz and asked them if they could not arrange to have the deposits made in the American Fidelity account, made directly and immediately so that that bank could report to them the deposits daily, an action which amounts to a clear abrogation of Mr. Lotz' contract with them, because he had sixty-five days—I believe at that time seventy-five days within which to make his payments on his accounts. But even before Mr. Hart arrived in Oakland they proposed that that contract be abrogated to the extent of cutting out any credit period and making the payments directly and immediately. That seems to me to be significant in the light of Mr. Hart's very

relaxed attitude on the condition of the account. There wasn't any discussion in New York about termination or any cancellation. He was not worried about it. He was not concerned. But he did come out with his general counsel within seven days or eight days after the New York meeting. He teletyped Smead in the meantime asking about collections, and they had their meeting on August 20th in Oakland, and on August 22nd, as the statement says, they prepared and secured from Mr. Lotz his signature to this highly significant document which is in the most complete legal form. They cancelled Mr. Lotz' general agency contract, they tore up his policies, they deprived him of any control over his own financial affairs thereafter, and they [1093] empowered and gave Mr. Smead supreme authority as their agent in respect to Mr. Lotz' affairs. [1094] They handed Mr. Smead the letter with the \$1,000.00 bonus—let us use that term for a moment—if they got paid off in less than 30 days, \$250,000, they gave Mr. Smead supreme authority as their representative from Mr. Lotz' Agency with respect to financial matters. Then in Mr. Hart's letter to Mr. Will that I referred to before, August 29th, in discussing what they did to Mr. Lotz, Mr. Hart says this: I should go back. "Attached hereto is a memorandum agreement between the American Fidelity and Casualty Company, the American Plan Corporation and Joe Lotz." That is the one executed in Oakland August 22. "You will note that this agreement spells out Joe Lotz' obligation to us as well as the mechanics of liquidating such. In effect Joe Lotz is an

employe of the agency at a salary of \$150.00 per week and is not permitted to handle any of the financial affairs of the agency. On the other hand Ralph L. Smead has been appointed as our representative and is in complete charge of the agency from the financial standpoint."

I mention that at this point because it comes as a striking contract to Mr. Hart's testimony that this was just another collection matter. He was not concerned and he did not intend in New York to cancel Mr. Lotz' agency, and he came out and only ultimately did it because Mr. Lotz had a better deal with Mid-States.

Mr. Smead states in his statement that Mr. Hart [1095] instructed them to deposit all funds received by that agency in the American Fidelity Company trustee account in the Central Bank, that is exactly what the contract says for them to do, that is exactly what the letter appointing Mr. Smead, their agent, says for him to do. In his statement he says that Mid-States had a balance coming due in August, and that Mr. Smead called Mr. Hart and asked him if he should pay the Mid-States balance, and Mr. Hart said yes, he should. Mr. Hart now admits that that is true. However, the statement then goes on to recite that by October they had paid all of the American Fidelity balance down to \$61,000.00, entered into the arrangement of repeating the performance they had undertaken on the Public Service business and took \$61,000.00 of business that had been written for the American Fidelity and gave the liability to the Mid-States. So it seems to

me when you analyze that statement that the only points in dispute are the points involving alleged conversations. All of the acts that are reported there were performed. The very things that brought about this loss that Mr. Smead says were contemplated in New York were actually done.

Now, there are a number of conversations that are reported here. Your Honor will remember that at the meeting in New York Mr. Smead said Hart told Lotz not to disclose Hart's position in the matter with anyone out in Chicago in the Mid-States Corporation, for Lotz not to see Mr. Cass because he [1096] might be friendly with Mid-States, having formerly worked for them.

Mr. Smead says that Hart put the call through station-to-station to avoid the operator in Chicago knowing where the call originated, and that when one of the men asked Mr. Hart, "What is going to happen to us when Mid-States finds out what is going on," Hart said, "Don't worry about that. We will meet that when we get to it."

Now, maybe Mr. Smead made all of that up. I have never actually heard about putting any station-to-station calls to avoid the identity of the origination spot being disclosed. I can see now that that might happen. But I'm not going to argue that you ought to believe Mr. Smead on that and you ought to disbelieve Mr. Hart, because there is a clear conflict of the evidence. I simply say that it seems to me strange that Mr. Smead and Mr. Lotz would go so far out of their way to fabricate this detailed conversation. Actually it lends itself beau-

tifully into the scheme that was discussed there and which was actually completed. Certainly Mr. Hart would not want his position known because the Mid-States would become suspicious immediately. Certainly did not want Mr. Lotz to see Mr. Cass because of the same reason. Certainly if he were going to go through with this he would have to run the risk of what would happen when Mid-States found out about it, and he would worry about that when he came to it. Well, that is exactly what he did, [1097] and I think he is worrying about what is going to happen when he now has come to it.

At any rate, Your Honor, these statements record, insofar as the essential theme of this trial is concerned, they record exactly what happened, and it could not have happened by chance. It had to happen by design, and if we did not have the performance of the parties, the clear performance of the parties, it might be a little difficult to understand the statements, but when you put them up against the facts of life, the cold reality of what the parties did, then it becomes just as simple as a primer.

There is no question but that regardless of what was said in New York between the parties—let us forget that—let us just put that over in the category of conflicting evidence. Let us try to approach this from the standpoint of what is there in the case which is not in dispute? What can we tie to as being established fact? There is no question that when Mr. Hart and Mr. Feller got to Oakland they knew that the Public Service deal was being negotiated, and

they knew that it was closed while they were there. Mr. Hart so testified. True, he says his interest in the Public Service deal was based upon his knowledge or his belief that Mr. Lotz was going to get an advance commission for Mid-States because he had an advance commission contract with Mid-States. So he was not interested in the premiums. He did not think he was going to get the [1098] Mid-States premiums. He was only going to get Mr. Lotz' advance commission.

Let us just pause for a minute and check their testimony with the facts. It is true that Mr. Lotz had a fifteen per cent advance commission under his contract with Mid-States, so if he wrote \$100,000.00 worth of business for Mid-States he would be entitled to retain fifteen per cent of that as advance commission. The balance, if any, would come after the business had run off, and depending on whether or not the losses had been sufficiently low as to permit any commission to be paid. But in getting this Public Service business, because they got it in a wholesale block, Lotz paid the managers for Public Service Insurance Company a twenty-five per cent commission for the business, and Mr. Hart said he knew that. So that meant that even though Lotz was entitled to retain fifteen per cent as advance, he was paying out twenty-five per cent, so that he would be out of pocket ten per cent on the Public Service deal by Mr. Hart's own knowledge and testimony. So instead of Mr. Lotz getting any money from the Public Service Deal honestly with which to pay American Fidelity, he would

have been required to have paid out of pocket a substantial piece of money to get the business, and had the premiums gone to Mid-States as they should have, then, of course, he would have been worse off insofar as American Fidelity and Casualty are concerned than had he not written it at all. [1099]

So how could Mr. Hart say to you, if Your Honor please, that he was interested in the commission that Mr. Lotz was going to get? If he were only interested in the commission, why would he care how the checks were made payable and how they were going to be endorsed? You will remember now there was a little difficulty with the Public Service. They wrote one check for \$60,000.00. They wrote it payable to Lotz personally, and then they got apprehensive and they stopped payment on that check, and they reissued it in the name of the trustee's insurance company, and Lotz endorsed and deposited that check, and that was one of the checks involved in the lawsuit against the Anglo Bank, because we said he did not have authority to endorse the check. But if Mr. Hart was not concerned about this account, it just was a normal collection matter, why did he teletype Mr. Smead on the 29th of September, just a week after he had been in Oakland, as follows:

"How about funds of \$1,450.00 which you received last Friday? Also has check of \$30,000.00 actually been paid at the bank AFC account?

"Answer to both questions: Checks are all payable to Mid-States Insurance Company awaiting authorization required to deposit. We are advised by

that company that authorization has been forwarded to us. That is the only holdup, but it has been definitely cleared. After your telephone [1100] conversation yesterday with Smead, who incidentally is a banker of the Central Bank, everything is much better."

That is Mr. Hart's telephone call to Mr. Smead.

This is Hart coming back:

"Understood Public Service checks were made payable to Lotz. Has this procedure been changed?"

Mr. Smead says, "First check payable to Mid-States. However, this has been changed and if we do not receive authorization right away from them we can have reissued."

Is that the interest that Mr. Hart would normally have in an agent's operations that were perfectly healthy and in simple liquidation process? Why was he concerned about the endorsement of the Public Service checks any more than the checks of any other assured or any other sub-agent that Mr. Lotz might have? And why did Mr. Hart ask for the address of the Public Service Insurance Company through the teletype of September 6th? He said he did it because he became suspicious and he began to doubt that Mr. Lotz had a deal with Mid-States Insurance Company whereby Mid-States were going to take this Public Service business and not get paid for the premiums. He became suspicious.

So what does he say he is going to do with that suspicion? Not call the Mid-States Insurance Company, the one whom he thought might know the

fact, but to call the Public [1101] Service Company, who would not know it anyway. He would have no way of knowing what Mid-States understood to be the case, and he was going to ask them what they thought Mid-States knew.

Mr. Smead says that that is the way they were going to pay the American Fidelity and Casualty account and what did they actually do? They paid them every penny that they got from the Public Service Company, and they put every single penny's worth of liability under those policies on the books of the Mid-States. So that the net result, when they got through with that and the other transactions, including the rewrite, was that where on August 13th American Fidelity Company had \$250,000.00 coming, Mid-States had \$29,000.00 coming, by October, American Fidelity had nothing coming, they were overpaid \$10,000.00, and Mid-States had \$416,000.00 due from Mr. Lotz, an insolvent insurance agent.

Mr. Smead says that Mr. Hart told him not to tell Public Service about American Fidelity and Casualty Company's interest in this Public Service deal. Mr. Hart denies it. Well, we will leave that over on the side of matters which are in, as Mr. Bronson says, high conflict. But it certainly would be the act of a person who was benefitting to the extent of some \$90,000.00 in a transaction which was shot full of wrongdoing, agency breach. I am sure that the measure of the Public Service transaction must be clear to Your Honor. Those insurance transactions are always complicated. I am never satisfied when [1102] I have tried to explain them

to anyone. I do not know that I am satisfied with my own understanding of them. But just running over it again very briefly, the Public Service was in trouble with the Insurance Commissioner because they did not have enough surplus. They actually ultimately were taken over and went out of business. They did not have enough surplus, so they had to get rid of some of their writings. They had to do it fast, and they had to do it in substantial amounts. So it was a natural for this kind of situation, they just simply took those twenty-two hundred or whatever they said the number of policies was out of Public Service and they cancelled. The Public Service gave up the premiums that they had theretofore been paid by the sub-agents for a portion of the policies remaining unexpired, they gave that money less the twenty-five percent commission to Mr. Lotz. So then Mr. Lotz took those policies and rewrote them without the knowledge of the Mid-States Insurance Company, in the Mid-States Company on their policies, thereby giving the Mid-States that liability of \$130,000.00 or \$150,000.00 and giving the premiums to the American Fidelity. It is important to understand how such a thing is possible. You might say to yourself, "How can business be done if such a thing as that is possible?"

In the first place, under a general agency arrangement, and under this contract that Mr. Lotz had with both of these companies, of necessity he had the right to issue policies in the [1103] name of his principal. Let us call it binding authority. He had the right to bind his principal by issuing policies,

and in the normal course of events he will issue one policy or two and then they are forwarded, and the company always has the opportunity of controlling in that way his underwriting practices. But he has that authority and he can legally bind the company not only on the normal kind of transaction of one, two, or a few policies, but by virtue of the authority itself he also has the power to write a thousand policies or two thousand policies, and if he wants to do a wrong, he can write those policies without the company's knowledge, and whether they like it or not they are stuck with it. They may have an action against him, but as to the public, they are on that business and they can't get off of it. But it must be remembered that this transaction, both the Public Service and the American Fidelity and Casualty rewrites were not normal transactions. They were extraordinary. In fact, Mr. Smead said that they had never had one like it before in Mr. Lotz' agency. It was not the kind of business that it was appointed to transact. He was appointed to go out, get business from a number of agents, and have the policies written at the inception, and this was the extraordinary thing that happened to come along to meet an extraordinary situation, and because of the extreme pressure that these teletypes record, Mr. Lotz and Mr. Smead yielded and they took this business and did not tell the Mid-States Insurance Company [1104] that they were going to do it.

Mr. Smead recorded in his statement that he asked Mr. Hart about paying the Mid-States \$29,-

000.00 for their balance due in August. Now, the significance of that is two-fold. First, it shows the complete domination of Mr. Hart over his agent, Mr. Smead, because certainly there wouldn't conceivably be under a normal, healthy agency relationship the necessity of asking one competitor company whether he should pay his account to another competitor company. That is one aspect of that. The second is that that payment became due to Mid-States on August, and why did Mr. Hart want that account paid? Because if it were not paid in August, Mid-States might be forced into some kind of inquiry or investigation. They would become suspicious of Lotz' financial condition, which would have been the first thing that might have occurred that would have caused him to come in, and as they would then have discovered the rewriting of the Public Service business which was going on and the collection and payment of American Fidelity of all collections from the sub-agents which was then going on, and it would have thwarted the entire plan of the American Fidelity and Casualty accounts. But by paying them their \$29,000.00 due that month, the Mid-States people were perfectly content. They had no notice that Mr. Lotz was in financial difficulty. They had no knowledge that he was doing anything in violation of his agency contract. Every account with him was current, and they [1105] had a perfect right, as they did, to assume that Mr. Lotz was not only performing his contract, but was obeying the law.

Mr. Hart says that when he was in Oakland he

was so relaxed about Mr. Lotz that he did not even ask him how much money he owed other companies or what might be due sub-agents or other companies, and he did not ask him to get him any figures. He did not particularly concern himself with the financial condition of Mr. Lotz' agency. He simply asked Mr. Smead how much money was owed them from their sub-agents because of the American Fidelity and Casualty writings, and Smead said \$75,000.00, and he pointed out to him that it had to be \$150,000.00.

Smead says, "I guess you are right."

Mr. Hart is an accountant by profession. He is an exceedingly well-informed, successful insurance executive. He now is the president of his company. He has this little agent in Oakland writing this automobile finance business who is broke. A \$50,000.00 check bounces two weeks before. He has owed him \$7,000.00 for two months. He has brought his general counsel out to Oakland. He does not ask him what the condition of his affairs are. He doesn't ask him how much he owes other companies. He said he was not interested in how much he owed other companies. He did not care where they got the money. It was not his problem.

Now, let us see what the undisputed facts are about that [1106] meeting in Oakland; he was there for two days, remember. We have the signed statement of three young ladies, two of whom came into this court and testified, and said that they each worked on the books. One was the head of the department. As they remembered Mr. Hart being out

there. They made runs on the adding machines and they made the totals, then some time thereafter, Mr. Hatfield asked them to give them a statement about the facts, and his statement was signed by them, and I am going to read it if I may. December 18:

"During day of August 20th, 1951 while Mr. Mark Hart was in Joe Lotz's office I was asked to furnish him with the following information:

"Total premiums payable to companies; total receivables.

"I spoke with our bookkeeping department in the presence of Mrs. Janice Howard, Miss Lyla Bowman, Miss Faye Roach, and a tape was run to furnish the above requested information. To the best of my recollection the below figures are approximately correct:

"Total Premiums Payable: \$287,000.00.

"Total Receivables: \$75,000.00.

"The following day, August 21st, 1951, I was asked to compile a listing by policy number, name of insured, amount of premium, and by individual agents, the unpaid [1107] American Fidelity and Casualty Company accounts receivable—This information was compiled by Miss Roach and Miss Bowman of this office and I believe that the figures below is the approximate total amount, by agents, of American Fidelity and Casualty Company's Receivables:

"Total A F & C receivables equal \$51,000.00.
(Signed) Ralph L. Smead.

"12-18-51.

"The undersigned recall incidents set forth in the

above statements of Ralph L. Smead with the exception to verification of amounts involved.

“(Signed) Faye Roach, Lyla May Bowman, Janice S. Howard.”

Miss Roach, the same young lady, identified the very exact copy of the agent's balance which was prepared at that time. She identified her own memorandum in her own writing which says, “This is a copy of the recap of all American Fidelity and Casualty Company unpaid items as per Ralph Smead's request August 20th. Copy of statements were given to Mark Hart. Faye Roach.”

Let us take another aspect of that thing. They brought Mr. Sam Feller out here, the general counsel. He spent an entire day at the bank trying to get Lotz a loan. Now, if we are going to believe Mr. Hart's version of that Oakland meeting and trip, [1108] we are going to have to assume that Mr. Feller was at the Oakland bank an entire day trying to get Lotz a loan without one scrap of paper as to Lotz' financial condition. To me that is the most incredible narration that I have ever heard. How in the world could they expect a bank to loan Mr. Lotz \$50,000.00 if they had no information as to what his financial condition was. What are they going to loan it on? Mr. Hart said they were going to loan it on his credit on their books, but no bank is going to make a loan to a borrower if they do not have a financial statement, if they do not know how much they owe the public generally. They might owe the public ten times the amount coming from American Fidelity.

Mr. Feller might have been sufficiently uninitiated to go over there in the morning and start to talk about a loan, but he would not have stayed there long because they would have told him to go back and get some figures, but he stayed there all day long and he never had one scrap of paper, according to Mr. Hart and Mr. Feller to support the application for a \$50,000.00 loan for a little Oakland insurance agent out here.

Now, what is the importance of this thing? I think this is a key point in this case. First, because it demonstrates that Mr. Hart did not give this Court a very accurate report of what occurred. Secondly, if he had to admit that he had these documents or had this information, it would show that he had only \$71,000.00 coming on business that Lotz had written for [1109] him, and there wasn't any possible way in which he could have received \$250,000.00 from Mr. Lotz except by invading the premiums of other people. That is the importance of that little discrepancy in what he says the facts are and what these young ladies say the facts are. I am not going to say what the interested parties said. I am going to rely in this instance upon these totally disinterested young ladies, who do not care a whit about this case or any of the parties in it, have not been employed there since 1951 or the beginning of 1952. Mr. Hart could not possibly defend his case without denying that he knew that he only had \$71,000.00 coming from Lotz, because it would have been just obvious that he had to get somebody else's money to get paid \$250,000.00, but that is the fact,

and he got paid \$250,000.00 and he got it partly by taking other people's money and he got it partly by foisting off some of his business on Mid-States when Lotz was broke. He knew it and they did not.

I say a turning point in this case is the action of Mr. Hart and Mr. Feller when they came to Oakland August 20th.

A very peculiar circumstance, one to show how people involved in these things overreach. They were not satisfied with all of this. They entered into this unholy contract with Mr. Lotz, and they appointed Mr. Smead their agent thereafter in all supreme authority in all financial matters. That was the most stupid thing they could have done, and I am surprised [1110] that a Park Avenue lawyer from New York would fall into such error, because after that date the Public Service deal was handled and processed and completed, and monies were misappropriated, the other premiums of other peoples were paid to the American Fidelity, and in every minute of every day Mr. Smead, in performing those acts, was the agent of Mr. Hart and his companies, The American Plan and the American Fidelity, and every minute of every day they had knowledge through him of what was being done, and they are charged under the law with liability for his acts if they are wrongful acts, because he was their agent and his knowledge is their knowledge, and if they are not convicted on any other piece of evidence, they are convicted upon the contract that gave Mr. Smead supreme authority over Mr. Lotz' financial affairs after August 20th, be-

cause that was when this skulduggery began and it was carried on up until October.

Mr. Smead says Mr. Hart employed him after they got themselves paid out, and it is true he did. He admits he employed him for six months because he said he couldn't find anyone else who could do this particular work that was so complicated, and so technical. We found somebody else. We did not have to hire Mr. Smead. We found employes who could close this thing out. But he employed him, and within six months after his employment he promoted him to Pacific Coast Manager of the American Plan Corporation. Is that the action [1111] of someone who repudiates and brands as false and untrue the statement that Mr. Smead made? He must needs have had a very bad opinion of Mr. Smead to give him the Pacific Coast responsibility for his company. He continued him on his payroll until he gave his deposition and testified in the bank case favorably to American Fidelity and Casualty, and then he no longer needed him.

The timing in all of this is highly important. It happened fast. It happened all within a very short period of time. Mr. Hart was on top of it from the very minute it started. The evidence of insolvency stands unimpeached. We have the testimony of Mr. Horton and we have his balance sheet showing Mr. Lotz' insolvency in July. He was insolvent in November, he was insolvent in October, and he kept getting more insolvent as Mr. Hart took the premium income and by September 17th—that was August 22nd to September 17th, less than a month—

Mr. Hart had received \$140,000.00 from the Lotz agency—cash.

Where did he think the balance of the money was coming from? Even on his own statement he says he had \$140,000.00 or \$150,000.00 coming from sub-agents. On his own statement where did he think the balance was coming from? He said he did not care. He did not inquire. As he told them in New York, he wanted to get paid and that he didn't care how, and that is exactly what he did. When he made the arrangement with Mr. Lotz [1112] to pay him \$250,000.00, when he made that arrangement on August 22nd under this contract to pay him \$250,000.00 by September 15th, less than a month away, he knew that not only Lotz could not do it, but that he could not do it conceivably out of premium monies that belonged to the American Fidelity and Casualty because they would not become due that fast, even if they had that much money on the books. They would not conceivably come due that fast because they were not all written in one month.

I see it is ten minutes after eleven.

The Court: I was waiting for that.

Mr. Garrison: Thank you.

(Recess.)

The Court: You may proceed.

Mr. Garrison: That brings us now through October, through September and payment, as I said, of \$140,000.00 by September 17th and some more in the latter part of the month, and it got the parties down to the point where they had it all paid off except \$161,000.00. I assume the bottom of the bar-

rel had been sufficiently scraped at that point so there was some other device needed to clean up the balance. So the suggestion was made that they repeat the Public Service performance, and in this instance take a block of business that had been written in the American Fidelity and Casualty, and for which the insureds had already paid the premiums and funds dissipated, [1113] and take that business and the liability attaching to it and transfer it over onto the books of the Mid-States Insurance Company, and then let the Mid-States look to Mr. Lotz for premiums.

Bear in mind this occurs later in the year after all of these other activities, when Mr. Hart has all of this knowledge of the affairs of Mr. Lotz, has complete familiarity with their efforts to raise money and what they had done with Public Service and so on, and the Lotz agency had been absolutely squeezed dry, so they undertook then this so-called American Fidelity and Casualty Company rewrite.

Let us see how good their performance is in this transaction. Let us see how fair, how honest, how frank their dealings were with the parties in this instance and compare them somewhat with their previous performance. You will remember there was some exchange of calls between Smead and Hatfield, interesting Mr. Hatfield on behalf of Mid-States in some business, and then there were the teletypes between Hart and Smead, and finally Hart said, "I will find Hatfield myself." And by a fortunate circumstance, the wily Mr. Hart had the telephone conversation monitored or recorded, and under our or-

der to produce accommodated us with a transcript. I read it to Your Honor and I won't read it again in detail, but you remember how they started out with a friendly exchange of views about meeting again in a few days at some convention of [1114] insurance people and then they got down to a discussion of the deal, and Mr. Hatfield asked Mr. Hart whether or not Hart had kicked Lotz out of his company as an agent. You remember I asked Mr. Hart about that and Mr. Hart said he told Mr. Hatfield, "No, we didn't kick them out. Of course not, Jerry."

And I said, "Why did you tell him that?"

And he said, "Well, because it was true, because we had terminated the relationship by mutual consent, so I was accurate in saying that we had not kicked him out."

I asked Mr. Hart if he thought that was a fair answer, and he said, "Yes."

The significance, of course, is that had Mr. Hatfield any intimation that they had terminated their relations with Mr. Lotz for any reason, actual or otherwise, he would have been put on notice and inquiry as to why Mr. Hart wanted to get rid of some of their business.

He said, "No, of course not, Jerry." That, I say, is a half truth, to give it every possible benefit of the doubt.

Another positive misrepresentation in that telephone conversation by Mr. Hart is the question of when the business was written that was going to be transferred to the Mid-States Company. Mr. Hart

told Mr. Hatfield that the business was written in September, when he knew that he had cancelled Mr. Lotz' agency contract in August and had turned up the policies. [1115] But he told Mr. Hatfield that the business was written in September.

Now, the significance of that is that it led Mr. Hatfield to believe that they were still doing business with Lotz in September, that the business was very current business and had just been written under the normal and regular relationships of the company and its agent.

Page 8 of this message, starting at page 2, rather, the first reference:

"Mr. Hatfield: Yes, how old is it?

"Mr. Hart: September.

"Mr. Hatfield: September?

"Mr. Hart: September, and there are some August. But you see the September business is not due under our contract. We have seventy-five days.

"Mr. Hatfield: Sure.

"Mr. Hart: Actually until December 15th."

Mr. Hart said he made a mistake. Now, I could understand how he made a mistake if he simply used the term "September" in place of "August." But he did not do that. He not only used the term "September" in place of August", but he went on to compute the time when the premiums would be due: "Not until December 15th, seventy-five days." And then at the close of the conversation, on page 8, he makes this parting comment to Mr. Hatfield by saying, [1116]

"Mr. Hart: Some of them will go back to Aug-

ust (referring to the policies)—some of them will go back to August,”

meaning that they were written in September but some would go back as far as August. That, Your Honor, is a moving, active, positive misrepresentation of fact that induced Mr. Hatfield to act.

Now, let us see what he said about the business that was going to be taken over. Page 6 of this conversation, this exchange occurs.

“Mr. Hatfield: All right, Mark.

“Mr. Hart: We have a loss ratio. Now let me point this out. He has written with us \$355,000.00. He has only earned about \$100,000.00.

“Mr. Hatfield: I see.

“Mr. Hart: So it is not seasoned yet. You see, we get in on the tail end.

“Mr. Hatfield: Yes.

“Mr. Hart: And his loss ratio is in the low 70’s.

“Mr. Hatfield: Low 70’s?

“Mr. Hart: Yes. Now it is improving.

“Mr. Hatfield: It is improving?

“Mr. Hart: Yes, it has every indication of improving. We have one of his accounts that has a [1117] 46% loss ratio.”

Let us see what the fact was when he made that statement. This conversation occurred October 31st, and I am referring now to Defendant’s Exhibit N, which was introduced by Mr. Marks, and in October his loss ratio was 77.13. He says the loss ratio is in the low 70’s and is improving. Let us go back three months and see how much it improved. In August it was 74.03, in September it had increased to 75.96,

and in October it was 77.13. So instead of improving it was getting worse. In November it went up to 84, the next month, and in December it went up to 87. It never was in that period in the low 70's. It was not improving, it was getting worse. That, your Honor is a moving, active, positive misrepresentation of fact that induced Mr. Hatfield to act, and all of this time Mr. Hart knew that Mr. Lotz was hopelessly, piteously insolvent, that he had to squeeze, squeeze and squeeze, that there was not a red cent left.

That, we think completes the three points I mentioned: The insolvency of Mr. Lotz, the breach of Mr. Lotz' agency obligations to his principals, and the knowledge and participation by Mr. Hart.

The only item remaining, the fourth item, is the question of the Plaintiff's loss. No one disputes that Mr. Lotz owes the plaintiff's here \$281,746.00. That is in evidence by agreement without objection. That is their out-of-pocket loss, [1118] held down in every way that they possibly can, but simply the residue left after they cancelled the business, paid the losses, and returned the premiums to the assureds, starting out with \$417,000.00 at the end of December 1951, and going on down to the present day. We say that that loss is owed us, first by Mr. Lotz as our agent and then under the law, secondly by any person who participated with him in his breach of his duties, to us.

I am going back just a few minutes, if I may, to talk about the law. I said earlier that this is not a legal problem. I know Your Honor has tried a great

many of these cases and you know more about the law of an agent's duty to his principal than I will ever know, and I am not going to burden you with a lot of citations of authority. But it is important in this case that we have in mind the two theories under which we feel we are entitled to recover against all of these defendants, the first one and the simplest and the easiest one for me to grasp is the simple proposition of the duty of an agent to his principal. That duty is a fiduciary one, and that agent is required to render to his principal certain elementary, fundamental things. First he has got to engage in fair dealing to his principal. He has got to make a full disclosure to his principal of any facts that might affect the principal's decisions. He has got to account for any profits that he makes. He can't make any secret profits. He can't pay off his [1119] accounts to the detriment of his principal. He cannot at any time act adversely to his principals. Those are so elementary I am not going to burden you. I think the best discussion of his duty is the discussion of the District Court of Appeals in the Rattray v. Scudder case, 28 Cal(2) 214. Then, of course, there is the Wafford case, 68 Cal App, in which this whole field of law relating to the duty of an agent to his principal is discussed. I have here a whole list of cases. One I would like to mention is this, a case involving another insurance general agent, Maloney vs. Rhode Island Insurance Company, 115 Cal App (2) 238, in which they talk about the duties of the agent to his principal. And it makes no difference that the agent might be acting at the

moment for two principals. If he represents two principals the law says he has a bounden duty to disclose to each anything that might affect his actions for the other. So that the fact that in this instance Mr. Hart of the American Fidelity and Casualty were principals along with the Mid-States makes no difference. They cannot act for their benefit to the detriment of the other principal. So that under the cases, under the law, under Section 1730 of the Insurance Code, there just cannot be any question but that Mr. Lotz has a liability for any breach of his duty to principals. The relationship is established by a formal contract that is set out in detail. It is very current. Executed in September of the year, just before this [1120] case occurred. It was negotiated and it is of the highest formality.

The next question is what is the liability of the American Plan and the American Fidelity in their actions in this case. Your Honor knows so well that it would not require citation of authority that any person who participates, whether he benefits or not, any person who stands by with knowledge that the agent is breaching his fiduciary obligation to his principal and who benefits becomes liable just the same as does the agent. And it makes no difference whether the agent has a fiduciary responsibility or not. It is not necessary that the third person have a fiduciary responsibility. In this case of *Shallow vs. Ketcher*, 108 Cal App 21—incidentally, that is the one case I might have the temerity to suggest that Your Honor look at—in that case neither the plaintiff nor the meat company were fiduciaries of the

defendant, Lewis. They were simply victims of Lewis' activities, and by reason of his action and his knowledge of the action of the meat company and his participation in paying himself to the exclusion of the plaintiff out of the plaintiff's funds, the Court said he is liable although there is no fiduciary relationship between either of the defendants, Lewis or the meat company.

The second theory under which we believe we are entitled to recover is peculiar to this case because Lotz was an insurance agent, and under Section 1730 of the Insurance Code, because of the public policy involved, the insurance being affected by the public interest, Mr. Lotz had, as an insurance agent, even a greater fiduciary responsibility than does the average agent because of that public interest, and the law impresses upon premium funds coming into his hands the character of trust funds.

The distinction I make between the first principle of law involving the liability of the agent and this one, involving trust funds, is designed to avoid any question about the idea of tracing funds or the fact that we might have a duty to show particular funds or the contention that Mr. McKinnon is going to make that this was a debtor-creditor relationship, a trustee relationship, the trust aspects had been dissipated—and those things, while being present in this case, are not necessary to a recovery. We do not care whether they were trust funds or not. We do not care whether Lotz was a trustee or not. The only thing we argue is that he was an agent, that he got our money, that he violated his duty to us,

and he gave it to the defendant, Hart, Hart, knew it was our money and benefitted to that extent. The attorney general in his opinion in this States, Volume XVII, page 11, has reviewed this whole subject of the duty of an insurance agent. He talks about the commingling of funds. He talks about delayed payments by the agent to the principal and finds the conclusion with citationable [1122] authority that those things are not incompatible with the trustee aspect of their relationship and has nothing to do with it. They do not destroy it. So while we contend that Lotz was a trustee, that the funds were trust funds, we also say that that is not essential to recovery in this case, and we did not want during this trial to get involved in an argument about whether we could trace funds or whether there was a creditor-debtor relationship or not. That is not the basis upon which we believe we are entitled to recover. It is the breach of an agent's duty. I submit to Your Honor that if the agent breach his duty under this contract, if Hart participated with him and benefitted by it with knowledge then we are entitled to recover against both of the defendants, all of the defendants. Thank you.

ARGUMENT BY COUNSEL FOR THE INTERVENOR

Mr. McCallum: I presume, Your Honor, in the order of events I will follow Mr. Garrison.

The Court: Yes.

Mr. McCallum: This is the first time that I have

risen to address Your Honor that Mr. Bronson or Mr. McKinnon have not risen to object.

Mr. McKinnon: Perhaps if Mr. McCallum will be patient we will be able to accommodate him, Your Honor.

Mr. McCallum: First, Your Honor, let me say why the bank is involved in this case. We are in this case because of eight [1123] checks. These eight checks total \$97,421.34. Of these eight checks there were five of them that came from the Public Service Company and they total \$94,136.69. The remaining three checks only total a little over \$3,200.00, two of them coming from one individual and the third coming from another later in the order of time and events. So you see the bank's position in the particular case is involved primarily because of the acceptance of the Public Service monies and the deposit of those checks with the Anglo Bank by Mr. Lotz in his trustee account. Of that sum representing these eight checks, \$97,000.00, we have paid to the Mid-States \$37,500.00 of those \$97,000.00 that they claimed against our bank.

Let me begin first by relating the facts as they directly pertain to the bank. I think we should start on August 22nd 1951. At that time Mr. Lotz had an account with the Central Bank. It was on that day when Mr. Hart and Mr. Lotz and Mr. Smead went to the Central Bank and at that time Mr. Smead was appointed the sole and exclusive agent of the American Plan or the American Fidelity Company. I think Your Honor can remember these exhibits if I just identify them by their substance.

On October 30th we find some reference in the teletypes to the fact that the checks are coming in made payable to Mid-States and they are having difficulty in cashing them. Before that teletype, however, on August 27th—that is five [1124] days after Mr. Hart was in the Central Bank—Mr. Lotz wrote a letter to the Mid-States Insurance Company, that is the letter where he says, “Now, Gerald, this bank I am doing business with wants a resolution from you that I can endorse checks.” He is still dealing with the Central Bank, and this is five days after Mr. Hart was there.

Then we have the teletype of August 30th indicating trouble. Now, before Mr. Hatfield replies to Mr. Lotz’ letter of August 27th, Mr. Lotz goes to the Anglo Bank on August 31st. If I may repeat, on August 27th he wrote for authority. On August 30th the teletype shows they were having difficulty getting these checks cashed because they were made payable to Mid-States. There is also some reference to a telephone call in that teletype by Mr. Hart to the Central Bank.

The following day Mr. Lotz goes to the Anglo Bank, opens the account, and in response to the bank’s inquiry tells him he has authority to endorse checks payable to Mid-States.

On September 5th Mr. Lotz gets a letter from Mr. Hatfield which says they can’t give him the authority to endorse, and then that letter was followed up on September 10th explaining further why they cannot give him direct authority to endorse.

In between those two letters Mr. Lotz on Sep-

tember 8th wrote Mr. Hatfield and said, "Now, regarding my request for authority to endorse checks made payable to Mid-States, we do not have very many like this and those that we do have we can [1125] have them made payable direct to me."

We submit that was written by Mr. Lotz to allay any suspicion in the mind of Mr. Hatfield as to what was going on out here with respect to checks made payable to Mid-States Insurance Company.

Let us see what he actually did during that period of time. On September 7th the first Public check of some \$5500.00 was cashed by the Anglo Bank. That was after Mr. Lotz received Mr. Hatfield's first letter saying he did not have authority. On September 14th he deposited the check for \$67,500.00 with the Anglo Bank made payable to Mid-States. That is after he got Mr. Hatfield's second letter saying he could not have authority to endorse, and after he wrote Mr. Hatfield saying, "You do not have to worry because we are not going to have checks made payable to Mid-States that we can't turn around and have made payable to us."

Then following through, on September 24th, \$11,250.00 was deposited. On September 28th \$3750. October 15th, a little over \$6,000.00. Then on November 16th and October 13th these other \$3200.00 worth of checks. But every single one of the Public Service checks and every single one of these other three—in other words, all eight of these checks in which this bank was involved—were deposited with us after Mr. Lotz had received notification from Mr.

Hatfield on two separate occasions that he did not have authority to endorse the checks. [1126]

Remember also that not only was Mr. Lotz telling the Anglo Bank that he had authority to endorse these checks, but so was Mr. Smead. And Mr. Smead, at the time he told the bank, on several occasions during this period of time, when Public Service monies were being deposited, that Lotz had authority to endorse. He had already been appointed the agent of the American Fidelity or the American Plan Company, and Mr. Hart, in response to my question testified that when Mr. Smead told the Anglo Bank that Lotz had authority to endorse those checks, he was acting as their agent, and Mr. Smead also admitted that he told the Anglo Bank that Lotz had authority to endorse, even after he had gotten Mr. Hatfield's letter saying he did not have authority.

So we have the direct misrepresentation of both Mr. Lotz and Mr. Smead telling the Anglo Bank he had authority to endorse these checks, and then, of course, we have the actual endorsement on those checks and a deposit in the bank.

Now, why? Well, Mr. Lotz and Mr. Smead did not get the money, so we cannot presume from that that they told the bank these falsehoods because they wanted to gain something for their benefit. The truth of the matter is they told the bank these falsehoods because they wanted to get the money to pay it to the American Plan, and the best evidence of that is what they did with the money after the Anglo Bank cashed those checks for them. [1127]

On September 11th Mr. Lotz had in his account a little over \$15,700, and of that \$15,000, \$5,500 of that represented the first check he received from the Public Service Company. On it he paid American Fidelity \$15,000. These are the figures that Mr. Marks corroborated on my cross-examination. So of that \$15,000 that was paid to the American Fidelity on September 11th, some \$5,500 of it came from the first check of the Public Service monies.

On September 15th Mr. Lotz had on deposit \$74,472. Of that \$74,000, \$67,500 came from the large check from the Public Service Company. So we have the difference there of his own, or whatever were not Public Service funds, of the difference between \$67,500 and \$74,000. On that date he paid \$60,000 to the American Fidelity Company. So a very, very substantial amount of the second or the third largest check of \$67,000 went to the American Fidelity Company.

On September 26th he had had \$17,000 odd in his account, and of that there was \$11,200 received from the Public Service Company. So he had of his own or from non-Public Service funds the difference between \$17,000 and \$11,000. And on that date he paid \$15,000 to the American Fidelity Company. So a very substantial part of the \$11,000 that he got from Public Service went to the American Fidelity Company. Now, that is where the bulk of this money went.

The Court will recall that at the outset of this case [1128] Mr. Bronson made the very direct remark that he was going to prove to this Court that

every dime that the American Fidelity Company received was their own money, and I even recall that he turned and said to counsel, "I want counsel to understand that point as well." And I presume the reason why Mr. Marks was put to the task of trying to prepare a statement to show that Mr. Lotz during this period of time received sufficient funds from other sources—by that I mean sources other than premiums belonging to Mid-States Insurance Company—that they could have paid their bill in full.

Your Honor will recall that Mr. Marks admitted that that was a problematical statement. It was something put together on facts he had gotten from the record. It did not reflect the true facts. It does not, therefore, jibe with the statements which I just made to Your Honor, showing you how the monies went into his account and immediately were then turned over and paid to the American Fidelity Company.

So there can be no doubt, no question whatsoever that the American Fidelity Company received, so far as the bank is concerned, a very, very substantial proportion of the Public Service funds.

I do not want to go over what Mr. Garrison has done, but I think in support of the bank's case I ought to pass some remarks concerning how it fits into the whole picture. I think there is a key to this case. If we can grasp it, I [1129] think it will unlock the entire circumstances for Your Honor. I think this key is made up of four different things.

The first thing it is made up of is what happened

in New York when Mr. Lotz went back and talked to Mr. Hart. Now, if when Mr. Lotz was there he had only \$75,000 receivable and was only talking about borrowing \$50,000, that would make a total of \$125,000, and he admittedly owed American Fidelity \$240,000, then most conceivably the only source from which Mr. Hart could expect to get his money in the future would be from writings from other companies.

The second key or element that makes up the key is this act of non-concern on the part of Mr. Hart. A week later he is in Oakland with his general counsel, speaking to Mr. Lotz and Mr. Smead about the indebtedness to his company. Mr. Smead at that time says it is \$75,000. If I were the president of the American Plan Company looking for the collection of monies due to my company, and I had been told a week earlier that it was \$150,000 and was now being told it was \$175,000, I believe I would be most concerned about that circumstance. And even if that day or the day following, my general counsel went to my debtor's bank to negotiate a loan for \$50,000, when I had been told that he was negotiating for \$100,000 the week before, I would be doubly concerned over those circumstances, because then a week later I would know that was not \$100,000 to be borrowed and \$150,000 in receivables to pay my [1130] clients and my principals' indebtedness.

I think also that this picture of non-concern that Mr. Hart gives to us just does not fit in with the character of the individual. Remember that when Mr. Hart called Mr. Hatfield to talk about the

transfer of the \$60,000 odd thousand of insurance to the other company, he was very cautious. He had the conversation made of record. That is the act of a very, very cautious man.

Then there is in evidence before Your Honor a letter which Mr. Hart wrote to someone in his organization, some two or three pages, pointing out and justifying under all possible circumstances how his own company could report to any inquirer that Mr. Lotz was current. That again was the act of a most cautious and careful man. And so I repeat that if Mr. Smead told him it was \$75,000 accounts receivable and Mr. Feller reports back two days work trying to negotiate a \$50,000 loan, that would leave a very substantial amount from which there could be no source to get payment, and a man as cautious as Mr. Hart would be more than concerned.

I think the third element that goes into this key is the relationship between Mr. Hart and Mr. Smead.

Mr. Bronson took Mr. Hart through the whole statement, and Mr. Hart denied all the things in the statement that pertain to himself as a conspirator or his company as entering into any plan or conspiracy to pay Mid-States in preference [1131] to any other company. He admitted everything else in the statement.

As a consequence to those statements Mr. Smead had charged Mr. Hart and his company as being a conspirator and a deceiver, and, I suppose you may say, a cheater. If I were going to hire someone to look after the affairs of my own company, I do not

think I would hire a man who had branded me as a conspirator, a cheater and a deceiver. And again how does Mr. Hart justify it? He said he was the only man available out here. It does not seem that the only man available could be the man that called you a cheater, a deceiver and a conspirator.

Let us go further. He said he had to have him for a short period of time until the American Fidelity's business was taken care of. When that work was all done he turned around and he said in his own words, to give Ralph Smead a chance, they appointed him as his own company's Pacific Coast representative.

How does Mr. Hart justify that? How does he justify appointing a man as Pacific Coast representative of his company who has accused his company of being a conspirator, a cheater and a deceiver?

The only explanation I can offer to Your Honor is that Mr. Hart, being a very, very cautious man, wanting to keep everything under control, kept Mr. Smead there so he could [1132] control his future conduct. And that is what Mr. Smead has told us.

Mr. Smead has taken the stand, and I expect that Mr. Bronson is going to call him some names such as a perjurer and a liar, and has told Your Honor, under the influence of Mr. Hart, he endeavored not to tell the truth directly and wholeheartedly on previous occasions because of the influence and domination of Mr. Hart.

Now that that domination and influence is gone, Mr. Smead has come before Your Honor and admitted the facts to whatever consequences may flow.

Your Honor, I realize it is 12 o'clock and I probably have another five or ten minutes. Would you like me to continue or shall I step down?

The Court: I will let you decide that.

Mr. McCallum: If you will grant me five minutes more, perhaps I can complete.

The Court: I will give you ten.

Mr. McCallum: Thank you very much.

Those four elements, then, the fact that Mr. Hart knew there was not enough money available to pay his bill, the fact that he must have been concerned when he came out here in August a week later, and the relationship between Ralph Smead and himself, and the fact that Mr. Hart is by nature a much more conservative man and more concerned over collections [1133] than he has given the Court to understand here, are in my opinion the four elements that go to unlock this case.

I think if they are put together they make the key.

As far as the Anglo Bank's over-all position in this case is concerned, Mr. Bronson and Mr. McKinnon have suggested to Your Honor that the bank was negligent, and therefore since it was, since it was their own negligence, they have no concern over the loss or damage the bank has sustained.

The factor of negligence is not involved in this case. A person who comes to any other person and makes a direct representation and expects that other person to rely upon it, cannot afterwards come forward and say: "Well, you should have known better. You shouldn't have believed me. I lied to you.

You had no reason to believe I was telling the truth and you were negligent to think so."

If that premise of law were true, you could never have an action for fraud. As between the Mid-States Insurance Company and the bank, yes, the question of negligence was an important factor. But where Mr. Lotz, as the general agent of the American Fidelity and Casualty Company and the American Plan Company, and Mr. Smead as a duly appointed agent in charge of all his financial position, come to the bank and make a direct misrepresentation, the American Fidelity as the principal cannot now come forward and say: "Well, the Anglo Bank was negligent because they relied on Mr. Smead's and Mr. Lotz' [1134] statement."

The Anglo Bank could have done one thing they did not do. They could have written a letter to Mid-States Insurance Company. But the law is pretty well established that a person dealing with an agent may accept the representation of that agent as to the extent of his agency, but would be bound by it if the agent himself did not have the true facts as he gave himself to the third person relying on them.

As between the bank and Mid-States the question of negligence was an important factor, but as between the perpetrators of the misrepresentation, of the parties, the principals and their agent in making a direct representation cannot claim the bank was negligent and they relied upon it.

The bank claims that as a result of having been brought into this litigation because of this \$97,000 odd, it has paid to the Mid-States Insurance Com-

pany \$37,500 of that \$97,000, and if this Court should find that \$97,000 is owing from the defendant to the Mid-States Insurance Company, then the bank is subrogated to the \$37,500 of that amount of \$97,000, and I presume in equity, if this Court should find that fifty per cent of that \$97,000 is due to Mid-States, then fifty per cent of \$37,500 is due the Anglo Bank, and we would stand on the percentage of that portion.

The Court will recall Mr. Hatfield advised Your Honor that we had paid them \$37,500 of the \$97,000 involved. It [1135] should make no difference to American Fidelity or American Plan who they pay this money to if in fact they are liable, whether they pay it to the Mid-States or the bank. They are paying no more than they would otherwise pay depending on the judgment of this court.

I hear counsel say, "That is specious." Then this would follow from that: it would be intolerable, I think, in a court of justice for counsel now to come forward and claim they are entitled to credit of this \$37,500 that the bank paid to the Mid-States Insurance Company. They will claim, and they have already taken advantage of that payment because between the two of them they have admitted there is a certain amount of loss to the Mid-States Insurance Company, and that loss has now been computed, after allowing for the payment of the \$37,500. If that were the figure that were awarded the Mid-States Insurance Company against these defendants, they of course would have got the benefit of the \$37,500, a credit against an institution that

their own agent deliberately and willfully misrepresented the facts to be.

Thank you, Your Honor.

The Court: We will take a recess.

(Recess.) [1136]

Mr. Bronson: If the Court please, I am addressing myself to the fraud issue and other matters of law and fact I have asked Mr. McKinnon if he will address you upon, so we will split the argument in that way if we may.

Using an expression Mr. Garrison used, Your Honor, in his opening statement, he said that the plot of which his clients were a victim must have been lifted bodily out of a dime novel. He has some blackbearded ruffians coming out from New York with pistols in their belts and simply taking these poor little short pants fellows at Chicago, taking their little red wagons away from them, and we do not think it happens that way in real life, and I think the facts will show otherwise here, at least not with this kind of Chicago boys.

If Your Honor goes to the part of the testimony which is uncontradicted, it will appear that the rating was done in December 1951 out here in Oakland, and the raters were the little boys from Chicago, if I may be pardoned for the use of the expression again, and they ended up with what you might call the whole ball of wax, including the key to the mailbox.

I want to go back before that date, though, to trace the relationship of these people to 1949 and 1950.

The evidence shows that these men from Chicago were very, very hungry for premiums. Joe Lotz, it was found, was a very [1137] good producer of business. His business was growing by leaps and bounds, and Joe was pressed to the limit. The business, as Your Honor knows, came almost entirely from car lots, from out of town or uptown finance companies, and from soldiers, colored people, and the rest of that kind. It was sub-standard risks but it was super-standard premiums. The risk was calculated as high as 175 per cent of the manual rates for similar coverage so right at the start we have a situation where it was not the General Motors Acceptance Company type of business. It was not the insurance on the dowager's Packard car who has a careful chauffeur driving her around, and Joe was getting woefully behind in his business.

It is our contention, and we can prove in this case, as we have, that the Mid-States knew all about it. They inspected this account monthly at the least interval, men going in, officers of the company, two or three days at a time, not a quick look-see, but, as Joe Lotz said, with their coats off and their shirt sleeves rolled up, and every single day they got their dailies.

I say that for the Mid-States to play ostrich in this court room is a sham that does them very little credit. They were reckless in their hunt for premiums. I read to Your Honor from a letter written by Mr. Titus, the President, to his Vice-President out here, a man named Dick Cass, as early as the middle of 1950, a year and a half before the de-

bacle, [1138] seven months before they ever wrote a premium for the American Fidelity and Casualty Company, and Titus said, "You have got to watch this account on a day-to-day basis."

What was the scribbled response of Mr. Cass at the bottom of the letter? "Joe Lotz is worried", he said, "but we don't have to worry, not from our point of view." Those were his words. He said, "I will try to improve their loss ratio by ten or fifteen points."

In other words, dip into today's premiums to pay off your old obligations. I do not intend to bore this Court with too much of the Cass deposition, but some of it is most important in the contention of the plaintiff in this case that they were utterly ignorant of what was going on out here, the chances they took, and the financial condition of Joe Lotz. He said that he had supervision—I am reading from page 4—to a limited extent over Joe Lotz' account and subject to the president of the company at all times.

He was asked, did Martin Donnelly—that was his predecessor—tell you whether Lotz had a capital of his own?

"Answer: He told me that Lotz, as far as he could ascertain, did not have any capital other than his personal effects," clothes on his back, as it were, Your Honor.

Again he was questioned:

"Under the retrospective plan which was [1139] incorporated in this agency agreement did the

agents have to remit to the company 100 per cent of the premiums collected?

"He did.

"Question: Did the agent have to carry on his own any expenses that were incurred in the running of the agency business?

"Answer: They were the sole burden of the agent.

"During this interim period was he permitted to or did the company know he used the money for operating expenses and paying any sub-agents?

"Answer: There was knowledge of such facts, yes.

"Question: Did you personally look into the books of Mr. Lotz?

"Answer: I did.

"Question: Did you from a review of these books see what he paid commissions to a sub-agent?

"Answer: I did."

He was asked to elaborate on the question of his lack of capital, and Mr. Cass said in his deposition, when his writings were two or three thousand a month, his sole source of business was the Bank of America. He had practically no expense or overhead because all the work was performed by himself and family. When he started to grow beyond that position his need for work capital grew. He knew all about it during the period [1140] '49 and '50, he said, he secured his working capital by borrowing against deferred earnings.

"Question: By borrowing from whom?

"Answer: In effect borrowing from the company in this manner."

He would make certain collections, not all premiums, but certain premiums would be collected as written. There would be an interim period from that time until the due date to pay the company. You see this developing.

"Question: He was borrowing against this asset by using part of the premiums collected?

"Answer: That is right.

"Question: Was Lotz delinquent in paying his bills during that period that you supervised his account?

"Answer: There were frequent times when he would be late paying his premiums.

"Question: You would watch the account particularly to see that he did not get very far behind?

"Answer: Very closely.

"Question: At that time did your duties include supervision of the accounts of agents after their appointment?

"Answer: Yes, it did.

"Question: How frequently did you supervise [1141] their account?

"Answer: Almost daily.

"Question: In other words, it was a continuous supervision?

"Answer: Continuous supervision.

"Question: How many sub-agents did Joe Lotz appoint during the period that you had charge of the supervision of the account?

"Answer: The company appointed a great many. I would say 75 or a hundred, at least."

That was in 1950. That was the last time this man was in the company.

"Question: That is sub-agents for Joseph Lotz Agency?"

"Answer: At the request of Joseph Lotz."

Finally:

"Question: Now, this procedure of Lotz in using monies collected on account of premiums prior to the date he was required to remit them to Mid-States Insurance Company for operating expenses, was that contrary to any instructions to him from the company?"

"Answer: No.

"Question: You never objected to that on behalf of Mid-States, did you?"

"Answer: Never objected. [1142]"

If the Court please, Mid-States took this man by the hand and showed him the way. They stand in this court room and say those premiums collected and placed in a trustee account by Joe Lotz were inviolate. And here we have the words from the mouth of the man who was out in charge and bore a high position as vice-president of the company in charge of the West Coast literally showing Joe Lotz how to do it, quite the contrary of being a breach of instructions on his part. It was paternalistic. "Use our money as you like. Don't worry. Keep selling," they said.

And finally, as Your Honor knows, from one exhibit that was held up by Mr. Garrison this morning, prepared by one of the young ladies—it took

her two weeks to do it, two weeks following the time Mr. Hart and Mr. Feller were here on the 22nd of August—and I counted them up roughly—there is 125 to 130 sub-agents that were pouring business into that little store over on 14th Street, all of them working on high commissions. And still they claim their head was in the sand—Mid-States.

If Your Honor please, this is a vicious circle. Every business man with experience knows that as your business grows, it is one of the most critical things there is, and who knows more about it than these people in Chicago who have got general agents scattered in all the big cities around the country, for all I know, or at least in every state that they are admitted [1143] to practice in. They see this thing. They have knowledge of it. There is your vicious circle. As your business grows, there are more and more demands for operating expenses. Joe Lotz testified he had 40 or more employees in the store in the fall of 1951, and he said they were still three months behind in the posting.

What happened to him? That cost money to run, and as the agents increased, and as the business increased, there is a stretch of the rubber band until some day it is going to break, and I say that the most hypocritical statement we have heard from any witness on this witness stand is that Mid-States did not know what they were doing every minute of the time. There is only one explanation of it, Your Honor. They were hungry to get business. They were anxious to control the competition themselves.

What do you suppose Titus meant when he said to Joe Lotz—I do not know whether it was in May or in August—that it might have happened. I think it was in August when he was there following the New York trip. He said, “Joe, you are in trouble but we are going to help you. You go on out and get more business and we will take care of it.”

What did he mean by it? He meant exactly the same thing as he meant in the letter that he wrote to Dick Cass in the summer of 1950, the year before, when he said, “This fellow has to be watched from day to day.” And he meant exactly the same thing [1144] as he said in the letter of June of 1951, just two months before he was telling Joe, “You are in trouble.” He said, in an inter-organization thing, “unless we get better representation than Joe Lotz, we are always going to be in trouble.”

And Mr. Mead testified about this, and I want to pause to say this about Mr. Mead, a fact Your Honor may know. He is a lawyer of unsullied reputation. He is an honored and respected member of the Bar, a business lawyer for 25 years, and I should say, in view of his testimony on the stand and the absence of any effective cross-examination of Mr. Mead, he is entitled to every single bit of credit that any person can give to credible person. It is in his manner, it is in his appearance, it is implicated, connoted by his position in the community and in his profession. He said that when Joe Lotz got back from that August trip to Chicago, he was full of the most genuine gratitude to the Mid-States. He said that Mr. Titus was a fine fellow.

They were giving him an additional one per cent. They were cutting down the company's retention from fifteen per cent to fourteen per cent. He told Mr. Mead the words that he had given us from Titus, that, "Joe, you are in trouble but we are going to help you out of it," and they were going to do something more, which was a tremendous concession. They were going to let him carve out fifteen per cent as a prepaid commission before he remitted to the company, a terrific concession to a man who was cash poor. [1145]

Now, it was at this time, beginning in May, and finally in August, that Mr. Titus made his greatest competitive effort. I mentioned he cut down the retention by one per cent, he offered his prepaid commission, something apparently that is not customary in the business. Certainly our people can't do it. But see this important thing. Attached to that fourteen per cent was this. You have got to do a minimum of \$25,000 business a month. You remember the letter.

What is the exhibit number? You get it for me, Mr. McKinnon. Skip it if you do not have it readily. Don't bother. I want to move along.

The Court will remember the letter that accompanied the agreement of September 1st, 1951, written by their Mr. Hatfield or Mr. Titus in which he said, "Now we are giving you an additional one per cent. We are cutting down our retention by an additional one per cent, and I want that understood as being contingent upon increased writings," and they fixed a minimum of \$25,000 per month. The Exhibit

is Exhibit C for the defendant. That is dated May 17th, 1951. I was wrong in fixing it as accompanying the September 1st letter.

"Effective May 1st the Mid-States retention"—this is paragraph 2 of Exhibit C—will be reduced from fifteen to fourteen per cent with this additional one per cent granted in your favor, and trust you will show your appreciation by placing at least \$25,000 per month through Mid-States." [1146]

What did Titus want? He wanted more and more business from Lotz. He wanted the competition ended. He wanted American Fidelity out of there. He wanted heavier underwritings. His float period was now 60 days, far longer than the original 25 days. Why did he give him that, Your Honor? Because they know he had a habit, and they were willing to take that chance in their eagerness to accomplish the work they were about.

Don't forget this Your Honor, it is to be a secret. This letter was read where the signer, Mr. Hatfield, said, "You also are to keep this to yourself. It is a secret. I do not want it out for the competition." And with all of this screaming, if the Court please, about the "Don't tell" testimony, about Cass and about the station-to-station call to Chicago, here is this company swearing their agent to secrecy on a matter vitally affecting its business and vitally affecting its relations with other people, other companies that occupied the same position, soliciting the same kind of concealment that they charged the American Fidelity and Casualty.

I would like to depart from that subject for a

minute and consider the position of the American Fidelity in this affair. Our contract was drawn, as Your Honor knows, in November 1950, but the first underwritings did not take place until January 1951. Our contract gave Mr. Lotz a credit period of 75 days, so that for business written in the first month of the operation for American Fidelity, namely, January 1951, their first [1147] settlement would not be, overdue, until April 15th, 1951. Mark Hart came out here in April 1951, the month in which the settlement was due for his first writings, and he found, Mark Hart did, that he was operating on some sort of a float arrangement which was explained to him, and Mr. Hart said that he condemned it, he told them it was unsound. He told Lotz he should not be doing it. The term "float", Mr. Hart said, was new to him. But Sudekum was out here, too, in July, another officer of the American Fidelity, and he learned the same thing and he condemned it and told Lotz he shouldn't do it.

There is a little incident that is apparently unrelated. There is a check that did not clear for a couple of days because of some uncollected items. It was not an "NSF" check. But stronger in the minds of my clients was the inability of Joe Lotz to meet in August a \$6600 item that was due on some reinsurance transaction. In two or three days a much larger amount relatively, namely, \$66,000 or \$67,000 was due to American Fidelity from Lotz on his May balance.

In other words, on August 15th they would have coming from him for his May settlements that

larger sum. And here the man was unable to meet a relatively smaller sum, only one tenth of the amount. So they phoned out and said, "You come out here to New York, Mr. Lotz." And I imagine it was pretty peremptory. That is where they claim we put on the black beard and the mask and put the daggers in our belts and went about a very nefarious [1148] deal.

Do you know what the source of their information is, Your Honor? It is from a written statement from a character named Smead. It is taken entirely from the December 6th statement written a month later and from addenda that were added to it.

I say this, Your Honor, that we have a right to examine pretty closely the way that statement was taken. Mr. Mead offered some very pertinent testimony on that. Hatfield came to him on the fifth of December. Hatfield had been out here some time before November 27th, that many days ahead, because that is when the assignments were executed. Hatfield came to him and said, "I want to get a statement of some facts of the way this agency has been going. Will you call your client in?"

Mead, the attorney, got on the phone, called his client, Joe Lotz, and said, "They want a statement of certain facts about the way your agency has been operating. You come to my office at ten o'clock tomorrow, December 6."

Mead waited there in an empty office until past the hour. He called up Lotz and said, "What is the matter?"

And Lotz said, "There was a statement written

out last night." They beat him to the punch, Your Honor. But that was a surreptitious act. It was sneaky. It was a night meeting. Smead said he operated on these pages for five hours.

Mr. McKinnon asked him, "Didn't you tell me you were drunk that night?" [1149]

And you remember how he evaded it, finally saying, "Yes, but I had but two beers." It reminds me in passing, Your Honor, of the story of these fellows who are arrested for drunken driving and there is an odor on their breath, and it is always two beers. It has gotten to be something of a mockery around here for an excuse if a man is under the weather. I say in five hours, whatever the alcoholic stimulant was, whatever the influence that was exercised on that man, Smead, it must have been literally sweated out of him. And did you notice how careful Mr. Hatfield was to say he had nothing to do with it? He was in another part of the building and only occasionally he walked by. He anticipated that. He protests a little too much about that. He just occasionally dropped by. He didn't have hold of the man's hand or anything like that.

Who is this man, Smead, to whom Mid-States finds itself married? They put their whole case on Smead, Your Honor, no one else. Well, he is a baby face. He sits there and puts out this information, but what comes from his lips is positively shocking. He wrote those statements out, it is true, but subsequently on three occasions before the Insurance Commissioner, when certainly the American Fidelity and Casualty was not there, and for all I know

Mid-States was not there or had any interest in it, it was up there on some proceedings applying to Joe Lotz' license; and then there was the bank trial and there was the deposition in the bank trial, everyone under oath. He spoke. I am not going to read all I read to him, but I am [1150] going to read some of it because it gives point to what this is all about, what manner of man they are resting their entire case on.

He said in that proceedings, he made the answer to the question whether the statements in there were true or not. That was to Mr. Garrison. Not all the original statements; there were certain small portions of it that might be true, Smead says.

The question by Mr. Garrison:

"The majority of it was untrue?"

"Answer: The majority was untrue and very definitely untrue," was the answer of Mr. Smead under oath in the trial in the bank case.

"——I do not think that that supplement is true either from my recollection. That is something that Mr. Titus and I talked about because he asked me the question. He says he asked Joe if he saw Mr. Cass while in Chicago.

"Question: Did you fabricate all this conversation with Mr. Hart to make that up?"

"Answer: Mr. Hatfield and myself did, yes."

Fine fellow.

Now, Mr. Smead on page 81 of this record,

"Question: Is it true or is it not true that [1151] Mr. Hart told you to deposit those Public Service funds first in the trustee account and then in the

American Fidelity and Casualty account at the Central Bank?

"Answer: It is untrue."

He is referring to what he wrote on December 6th, two years before, a year and a half before.

"Question: Did you make that all up when you told it to me in my office?

"Answer: Mr. Hatfield and I made up all of those statements, Mr. Garrison."

Over here at page 118 he reads from the December 6th statement:

"In placing those calls Mr. Hart directed that the calls be placed station-to-station so that the place of origin would not be known in Chicago."

"Question: May I ask whether or not that is a true statement?

"The Witness: That is not."

That is Smead, and he is referring under oath to what he wrote in that midnight meeting with a bottle standing on the table, I have no doubt.

Your Honor, the worst of all, to show you the type of fellow they are relying on, is what he said up there in the Insurance Commissioner's office. We had this record prepared, [1152] and he said, "Referring to the conversations in New York when questions were asked and answers given about the financial condition of Joe Lotz Agency as of that date, which was August 13th, 1951, "Well, I remember the discussion we had at that time" (he is telling the Insurance Commissioner's Deputy in the hearing that has for its purpose only the question of whether or not a license is to be continued in the

hands of Joe Lotz)—“I remember the discussion we had at that time. I think we owed American Plan or the American Fidelity and Casualty in premiums written approximately \$240,000.00 or thereabouts. That was the balance at that time and date, with an estimation of how much premiums that had been written in the month of August to that time, and that would be due. Approximately \$240,000.00. Now, as we discussed with Mr.—well, with the gentleman in the American Plan office, our accounts receivable on the American Fidelity and Casualty business, judging from what we had written, should almost cover that.” That is \$240,000.00.

“We realized there was some shortage, although we did not tell the people in the American Plan office that we thought there was probably \$30,000.00 difference.”

That man would lie to anybody. He was supposed to be under our wraps at that time, and he is going up there and telling that he told a lie to us in New York and hid \$30,000.00 [1153] from us. That is the time the fraudulent plan was supposed to have been hatched. Now I ask Your Honor who can believe anything that this creature may say?

Your Honor is asked to decide this case on the basis of just the statement of that man, Smead, nothing else. I do not know what type of person he is. It is a pathological condition perhaps, if you want to be kindly about it, but he is the most perverted person in the world. He comes into this Federal Court, into these distinguished surroundings, into this place and make those utterances, and you

compare him with the arm-twisting he was getting back there on December 6th and the way they took him, this surreptitious manner, circumventing the attorney, and you can take your choice as to which one of them speaks the truth.

And what about Lotz? What have we to say for that man? I want to discuss him. I might say I am happy that none of our clients are here, none of the clients on the other side and Mr. Smead and Mr. Lotz are not in the Courtroom. It enables us to be a little freer in our discussion of those people. Mr. Lotz has been characterized as a salesman, not an office man, not a detail man, and I have no doubt that is true. Another thing about Mr. Lotz, he doesn't want to say no to anybody. He is a sort of a follower of the leader at the moment. He is apparently presently unaware of the contradictions in his own statements. Perhaps he has accepted the guidance of Smead. [1154] Lotz did say that he was ill and nervous and emotionally upset, postponing an operation at the time these things were going on, if it means anything. It seems plain to me that he was completely ignorant of the implications of the technical aspect of his business in accounts and in accounting. But I have no doubt he was working under the influence of Mr. Hatfield and Mr. Smead on December 6th, 7th, and 18th. Do you know what they were holding out to him? The apple of keeping him in business all this time. There was not a word about the cancelling of this agency until Titus got out here. There was not a word about cancelling the agency until they got the assignment of his business

from him and the deliverance of every scrap of paper he had in the place and in the hands of Mid-States, and beyond that there was not a word of cancellation when they were extracting the statement from Smead, but the promise to keep him in business was held out to that poor soul, Lotz.

Do you know what he said to Mr. Mead, his attorney, when Mr. Mead went over finally to the office of Lotz on the afternoon of December 6th? After Smead had done all his midnight work and he had signed it "Lotz" out in the margin or some place, and he said, "Is that your signature?"

"Yes."

These people were yelling for an acknowledgment and Mead said, "If that is your man's signature, I will acknowledge it. He has stated it is his signature and I will fix my notarial [1155] seal." But what did he tell his attorney in the confidences that exist between an attorney and his client?

"Lotz told me he did not know what was in the statements and Mead didn't know what was in them, and he said 'I won't touch them'."

Now, in the interest of a change of tempo, I would like to speak about New York. They say that was the cradle and birth of the conspiracy. You know why they went back there. Here is the fellow who can't meet \$6600.00, when \$66,000.00 will be due in a couple of days. Of course they are worried. They have found that he was operating his business by borrowing monies from the insurance companies. The effect of the conversations there was to allay their immediate fears about it. Joe Lotz knew

Cass. He wanted to see him in Chicago. It was reported by Smead in Smead's statement, "Don't tell those boys in Chicago that you have been to New York." That is stupid, Your Honor. The very next day or the second day after that, when Joe Lotz got into the office of Hatfield and Titus, the first thing he said was, "I have been to New York talking to those guys and they can't match your fifteen per cent prepaid commission."

You know how dear that was to his heart. How stupid. How trivial it becomes. If it is true—and it was denied—it is another piece of the machinations, the clever machinations of Hatfield and Smead weaving some fact in with falsehood and [1156] making the falsehood look like fact by the fact that it is in juxtaposition to fact, an old device.

And while I am on the subject, let me tell you that Mr. Garrison, an old hand at it, and Mr. Hatfield, who has been in the insurance business for a long time, used one of the oldest devices they could to make us think the Smead statement looked genuine. What was it? It is being done every day by insurance investigators here when they are not sure that a witness will stick with the story that they have gotten out of him. They make a purposeful mistake in the text of the writing, and then when it is read over, "Oh, I am wrong on that. It is Los Angeles and not San Francisco. Will you change that and initial it, please?" They go down, page by page, and then some time in a Court of law they say, "How can it be false? The man read it over. Look at these corrections he made and initialled

himself." It is an old, old device, but it does not prove that the document means anything or has any reliability.

I won't go over all those statements there that they made. You heard enough, I am sure, Your Honor, of the statement about the receivables, and about the amounts owing at that meeting. But what happened after that? Again I will go over quickly. Smead went to California. Lotz went over to Chicago to nail down his deal, telling them he had come from New York just a day or two before and they could not make the same concession to him, so he is ready to go ahead with Mid-States. But Smead is [1157] in a few days phoning out there, or they are phoning to Smead from New York, and they learn that the collections have not come in except a dribble, and the vaunted bank loan of \$100,000.00 is languishing. There are no hopes. Mr. Hart and Mr. Feller have some important business in Los Angeles on a trip they were making then. They diverted it long enough to come to Oakland to see the situation. And you know what transpired there. They verified the fact that there had been collections of only about \$8,000.00, where much more should be in. They spent some time at the bank and found you couldn't get a loan there, at least it was not forthcoming then. So what did they do? They cancelled the agency. Why did they cancel the agency? Obviously, it was going to be completely inactive. The deal that Mid-States had been willing to give to get this business, they could not match. It then became a question of getting their money and what

do you think went through the heads of the men in the American Plan and American Fidelity and Casualty?

For one thing they knew they were on the outside looking in. They had no preference at all in the mind of Joe Lotz. Joe Lotz was going ahead with the Mid-States because of a deal he absolutely had to have to keep going.

I propose to pick up this agreement that was prepared by Mr. Feller and signed there on August 22nd, and what I will call the \$1,000.00 letter to Smead and the conduct of events thereafter [1158] and see if it spells out a fraudulent conspiracy. First, Your Honor knows that there is a presumption of innocence of fraud set up in the Code of this State. 1963, Sub-division 1, says, "There is a presumption that a person is innocent of crime or wrong." The Brill case in 38 Cal App 2nd says, "A presumption of innocence is applicable in civil as well as criminal cases." And the Peabody case, 52 Cal App 2nd 581, is one and the most recent of many, many analyses of this—and I will quote the language of that case:

"One of the strongest indisputable presumptions is that a person is innocent and that the law has been obeyed."

Now, we are not relying on the presumption, Your Honor, but we do pray the Court to approach it putting the horse ahead of the cart instead of otherwise. Let us look at these facts and see if they spell an honest intention and lawful proceedings on the part of these people rather than the dis-

torted one that is attempted to be ousted in position, the presumption of guilt rather than innocence, and let us think of that, not as being supported by any people of the kind you normally meet on the street, but it is supported by Smead, that unsavory character. That is all.

This agreement and this letter were drawn in longhand by Mr. Feller in his hotel room on the night before they had a date. I am sure that agreement was conceived in fraud and dishonest [1159] concealment, the agreement would not have read as it does now. It would have been full of hedges, escapes and everything else. On the contrary, it was done with complete openness. It was typed up at the bank and a copy of it was left at the bank. The plaintiff points in that agreement to this language:

“Commencing immediately all premiums received by Lotz will be deposited directly to the account of the company at the Central Bank, Oakland, California.”

Now, they mean by that, they say, that every nickel of premium Joe Lotz got from any source was to go into the Central Bank. This is what I called a strained construction.

Let us go back historically and see what happened. We have the Mid-States Company, a company that recklessly extends credit and permits a complete destruction of the trust character of their funds, to permit agents to float on it, to pay off every kind of obligation he has got and to coast as long as seventy-five days before he has to pay up, and then to get behind thirty and even sixty days. On the

other hand, we have the company that wrote this agreement, through their attorney, and they deprecate that kind of thing. They say it is not sound, and in May and in July officers of our company were telling this man, Lotz, "That is no way to run your business." What did they mean when they said, "Commencing immediately all premiums received by Lotz will be deposited directly to the account of the company at the Central Bank"? They were going to [1160] see to it that the premiums that came to them were not diverted to these uses of Lotz. That is all it meant, and for them to try to squeeze out of that, what was the trouble according to Mr. Hart and Mr. Feller who were there on August 22nd? It was simply the man had gotten into trouble by that very thing and they were going to see it stopped.

As far as their premiums went, they were going directly into a bank so they were subject to draft by New York, and they referred during their examination to this part of the agreement, paragraph 8, the first sentence of it:

"The manager hereby appoints Ralph L. Smead as representative and Lotz agrees said representative shall have full authority over the finances of the agency, and in connection with the matters referred to herein subject to instructions of the manager."

It is only in addition to verifying the agreement they are taking from these people who have been brought up on float to get those trust funds of theirs, their premiums over into a bank account im-

mediately upon collection so they could not be diverted as Titus and Hatfield were willing that their funds be handled.

Here is another point, Your Honor, and to me it is the most compelling one. When men act in a conspiracy that is an illegal one or is designed to cheat and defraud someone else, you look for and you find their motive of gain or advantage [1161] of some type, and referring to both Mr. Smead and Mr. Lotz, I feel like challenging these people to show one single advantage coming to Lotz by the contract that was entered into on August 22nd wherein they agreed to see that their funds got collected quickly and put immediately into a bank.

Look at the situation, Your Honor, for just a minute. The prospects of the American Fidelity and Casualty Company at that moment were as dead as a dead mackerel in the Lotz agency. Mid-States was the fair-haired company. They were going to get all the business. Why? Because they will take everything Lotz writes. They have invited and encouraged him to increase his writings. They have told him, "Take \$15.00 out of every \$100.00 of their premiums right at the source for a prepayment, and we are going to give you another percent as long as you keep on writing more and more." What possible gain to Lotz and Smead to go into a nefarious deal of some sort with these people who were completely on the outside looking in? I say that is compelling to me because men act on a pattern of some sort. They do not go off on a tangent and do something that would be otherwise crazy.

What possible purpose of gain or advantage to Lotz in seizing premiums of the company that he was henceforth to look to to keep afloat?

Here is another consideration, this \$1,000.00 letter. The company in a sealed envelope made an offer to Smead and [1162] they said to him,

"You know, for the night work or leg work that you do when you are going to be out collecting premiums for the American Fidelity," that they no longer had any interest in, "—we will pay you \$1,000.00."

But, you know, Smead turned it down and he said, rather haughtily, "I will have no part of it." That was his testimony. What would happen if there was a real to *raise* Mid-States premiums? Wouldn't Smead have been right there saying,

"Give me \$1,000.00. Make it \$2,000.00," or something else, if he was doing something wrong for the benefit of a company that meant nothing to the agency any longer?

Now let us look for a moment at what I will call the well-oiled machinery of the conspiracy. Your Honor, it was anything but that. If they had proved conspiracy here, you would see the conspiracy operating. But what happened? You are faced from the moment that Hart and Feller left this town with the most vigorous, rugged, persistent collection methods that I have ever seen in my life. There were teletypes going forward every day, sometimes two and sometimes three times a day. They were riding him hard. They had to, and they did fight for their money. Does that spell out to Your Honor

a fraudulent conspiracy that had been entered into to accomplish without effort the very things that these men worked so hard for? And [1163] there is nothing wrong in that. In circumstances such as Lotz presented here, if a company is to survive, it must work hard to get its money.

There is the Public Service transactions, Your Honor. As Mr. Garrison said, the American Fidelity was definitely interested in the prepaid commissions due to Lotz out of the very large transaction with Public Service. That was business Public Service could not retain under the regulations in this State, and it was floating policies that were sometimes called on the street. They were available to anybody who wanted them, and Hatfield definitely wanted those policies. That is what he was after—more business. I am not spending too much time on that but the miserable Smead had one statement to make in that December affair when he said, “that the matter was broached to Mr. Hart while he was here.” And Hart said, “Don’t mention my name to Public Service”—the company that had the policies.

Hart denies this. Can Mr. Garrison suggest any reason whatever why the name of any company, whether they are interested in that business or not interested in that business, should be withheld from Public Service? I will bet Public Service was on the phone twenty times a day to move out that block of policies that they had to get rid of. Under the ruling of this Commissioner, there is no secret in that stuff, and for Smead, the coy, surreptitious

rascal to throw that in—you [1164] know Hart's denial rings true because it is perfectly ridiculous that a man should say, "Don't tell him that you talked to American Fidelity about the fact that they had a portfolio they had to get rid of." Of course not.

Now, there is the \$61,000.00 transaction that came at the very end. That was a block of A F & C policies. It was a flat cancellation. It was to wipe out the rest of our balance. I am just telling Your Honor in my humble view we are not called upon to ring up anybody and tell them what we are doing. Our policy gives us the right to cancel any policy for non-payment of a premium or for no cause at all. That is one of the characteristics of this type of insurance contract, and we can cancel one or we can cancel 100 of them or 1000 of them. It was the last transaction. It came at the very end of October. It was more than two months after the date that they said that the nefarious scheme of corruption was formulated in the middle of August. It had nothing to do with it. It could not have been anticipated. It hangs there all alone.

Let us pick up the \$61,000 transaction. When we cancelled flat, that could have been written in any company that is writing. We have not made an examination of the situation current on the insurance street in that date of 1951, but without going down there we know that one company was awfully anxious to get more and more underwritings out of this agency, and Hatfield wanted that \$61,000.00. There was a conversation between [1165] him and

Hart. There was a conversation between him and Hart on the subject and Hart said to Hatfield he was interested in picking up the \$61,000.00 cancellation, and he said very frankly, "*Jerry*," he (referring to Lotz) "has not paid us for the premiums." And Hatfield laughed. That is the significant thing. He laughed right into that record, and the next statement from Hart immediately following, "He told you that, I believe."

"Told you what?"

He means he has not been paying his premiums. And Hart answers, "Yeah."

You know, Mr. Garrison asks a question as if we had done some terrible thing. He said, "Mr. Hart, did you ring up Hatfield and tell him you were cancelling flat? Did you tell him you knew about Public Service?" As if we were a competitor and in respect of an agent where we are on the outside looking in; we have to go ahead and tell him all of our business. Is Mr. Hatfield telling us his business? Was Mr. Titus ringing us up? No. Although those parties are friendly, meeting at conventions, they are dealing at arm's length, if the Court please. And Hatfield, when he was finally moved in, the best he could do was to complain to Lotz that he had not been consulted first about the \$61,000.00 cancellation, and this was the first time that Lotz' authority to commit Mid-States had ever been challenged. [1166]

They charged us with concealment of insolvency. That to me, if the Court please, is almost naive. They charged us with concealment of Joe's insolv-

ency. We can ask the question first: Insolvency when? When was Joe insolvent? Before the trip to New York and Chicago or afterwards? If it was before, when did he come insolvent? If it was afterwards, when did he become insolvent, and when did we find out about it, if we did not tell you about it?

Your Honor, we asked for statements from Mr. Lotz that might have disclosed that thing if it were true, but what is the testimony of Mr. Hatfield and Titus? They deny that they were even curious about his condition, never asked for a statement of his finances. Mid-States' knowledge of his condition was at least equal and probably superior to ours due to their long association with Lotz and the fact that they had set up this float plan and had ridden along with Joe as he went bigger and bigger. Every means of ascertaining his condition were available to them equally with us. And I say they knew more because of these frequent check-ups that are made by company officers, sporadic or incomplete, but, as Cass said, and as I read you, he knew everything going on in that agency as long as he was there and somebody who supplemented or took his place undoubtedly kept up the same thing. Of course, they were getting their delays every day, day by day, week by week, month by month, but still they say they had their head in the sand and by some [1167] légerdemain, some crystal ball, we were able to find out something that they with all their means had not been able to find out and that were concealed from them.

Then there is the lost teletype message. I am jumping from point to point as quickly as I can in view of the limited time. That was another pitch of Mr. Smead's. That statement comes from him to the effect that he was asked by Hart to destroy certain teletypes that might involve him. You will note, and you did note from the testimony, that Smead never said that he did destroy anything but he said he was asked to.

Now, the so-called missing teletypes, if the Court please, have been laid in the hands of the Mid-States attorney before this trial ever started. Does that sound like any hold-out? Does that sound like any destruction? If it is true that Smead was asked to destroy these things, and if he claims that he did destroy them, then we have presented them with the information that they bring in here, and yet they turn upon us and hang and tie their kite to the testimony of Smead on that, where it simply won't hold together. They say we diverted Mid-States premiums to the payment of American Fidelity and Casualty Company balances due. I have treated of that subject, if the Court please, already, but I just want to add this. Mr. Garrison brought up the matter of what I understood to be a September balance of \$29,000.00 that was due to Mid-States from Lotz under their settlement plan that was then working on [1168] a sixty-day basis. And then there was an exchange of teletypes between Lotz or Smead and the American Fidelity and Casualty about whether they should pay the \$29,000.00 to Mid-States. Mr. Hart does not deny that. He said he

answered, "Sure, if you owe it to them, pay it to them." But look at the argument they make here, if the Court please. Anything we do is wrong. If Mr. Hart on hearing about the \$29,000.00 had said, "No, don't pay it to Mid-States, pay it to us," then it would have been paraded in this Court room as further proof of a fraudulent conspiracy to take funds of Mid-States and see that they got into the hands of American Fidelity and Casualty, but if we say, "No, pay it to the guy you owe it to," we are still wrong. Why? Because we were lulling them into a feeling of false security.

Your Honor, we can't do anything without being wrong, and that is the sense of that argument.

I will conclude in about five or ten minutes if Your Honor would like to give my larynx a rest at this point.

(Recess.)

Mr. Bronson: I told Your Honor I would conclude briefly and I will. Toward the end of November Mr. Hatfield came out here and, as Your Honor knows from the testimony and the exhibits, he took assignments of Joe Lotz and he took all the records and books of the agency and he did that in the knowledge of and with the advice to Mr. Lotz of Mr. Mead, his attorney, [1169] and as Mr. Mead explained, they were continuing to operate the agency under the hand of Hatfield and on a basis of some security to the Mid-States for the position they found themselves in with a large indebtedness due them. But the hand of Mr. Titus was visible the moment he came here. He got here on the 5th

of December, and that is the date the statements were taken. That I commented on already.

But there is another angle of this and a rather illuminating incident. We heard some testimony about a meeting in Mr. Garrison's office somewhere around the tenth or twelfth of December, 1951, if I am right. No one had yet said anywhere about taking the agency away from Lotz and closing it, any more than had been said at the time the statements were taken on December 5th, 6th, 7th, and, 8th, but at that time the Mid-States officials, whoever was here, wanted some additional concessions of control over the agency and they prepared some sort of writing that was presented to Mr. Lotz in Mr. Garrison's office at a time when Mr. Mead was there. Among other things that were contained in that writing was a right or a delivery of the keys of the post office mail box of the Lotz Agency to Mid-States, a sort of right of first raid on incoming mail or checks. Mead said in effect, "Look, there has been some talk of a suit here lately and we are not going to give you any further concessions if there is going to be any suit involving Lotz." And Lotz and Mead were asked to leave the room where this took [1170] place. They were out there for about ten or fifteen minutes and they were invited back, at which time it was stated on behalf of Mid-States there in that attorney's office, "There will be no suit." Thereupon the documents were drawn or signed and a letter which was presented or which was to be used in connection with getting access to the mail box was also signed. Your

Honor knows a few short months later there was a suit, and this incident recounted by Mr. Mead has not been denied in this Court room.

There was a final incident. Whether they were still holding out to Lotz that he was going to continue in business under their supervision and have a workout of some sort I do not know, but Mr. Mead said there was an opportunity to get a rewrite of the entire Lotz line of policies by some outfit known as the Curt Hickey Company in Los Angeles, and they told Lotz and Mr. Mead to go down there to Los Angeles and make the arrangements and promised a fee to Mr. Mead on that account, which he says was never paid, and that rewrite, according to the figures that were set out in the telegram and the letter sent back at Mr. Titus' request by Mr. Mead would have closed out the business then on the books, no matter what was done with the agency, at a loss of about only \$32,000.00.

In closing I say this, Your Honor. I am not here contending that Mr. Hart or Mr. Feller or anybody connected with AF & C are angels, that they are sprouting wings. They are business [1171] men and they are schooled in the school of business. It is a hard school. I say that they are entitled to the presumption of innocence, and I also say with humility that the weakest kind of evidence has been offered, that shambles of a statement of Smead's. There wasn't any fraud here that has been proved in any real sense of a preponderance of the evidence. There is only that statement and a lot of putting together of things to make something out of nothing. If the

American Fidelity and Casualty are guilty of anything it is two things. They had a reasonably prompt awakening about the condition that Joe Lotz was in and got out, and when they got out thereafter, they used vigorous, sustained efforts to get their money out of it. And I want to pause to say this, Your Honor. You may hold a policy of insurance, whether it is on an automobile, on your home, on your life, or on the life of someone dear to you. It is all written on the same basis. It is a spread of losses among many policy holders. One has loss, hundreds are without a loss, and the premiums collected in like amount from all pay for the losses and for the administration of the business that must attend to it. What is the duty of an insurance company? Its first duty is to its policy holders. It has got to see that the fund that pays the losses is held intact for the benefit of all policy holders, and the secondary consideration is the stockholders of the company that put the fund together in the first place.

Of course, it may be an explanation of the recklessness, [1172] the utter heedlessness with which Mid-States conducted this business until they finally found an avalanche pouring down on them that they had but one stockholder, one of the largest finance companies in the country, the General Finance Company. They do not feel that immediate concern that others do. So they came back in this fight to recoup themselves to a statement of Smead, that is all it is. I feel like paraphrasing old David Warfield: If they want their Smead, they can have their

Smead. Perhaps Mid-States or its officers feel a oneness with Smead by some unity of feeling or principal. That I do not know, but if it be so, I wish them peace in that beautiful union.

Mr. McKinnon: If the Court please, I assume that the case will be briefed at the conclusion of the oral argument and upon preparation of the transcript. That being so, and the time being late, I will limit my part of the argument to the utmost and I shall endeavor to complete the presentation of my phase of the case within twenty minutes. I should like first to discuss the Bank case very briefly. I confess, Your Honor, that I have been mystified by the Bank's case in this proceeding. The Bank seeks to recover here from the defendants the \$37,500.00 in this judgment of Mid-States vs. the Bank in what we call the Bank case. How do they present their case here? They could have presented it, I assume, by merely referring to the judgment, which by virtue of the consolidation of the two [1173] cases is a part of the record here.

They have not rested upon a presentation of the judgment, explained by the pleadings, but they have put on here in the course of some twenty minutes or thirty minutes during the past two weeks the appearance of a case against them and that, I say, has mystified me. It has mystified me because it has but the appearance of a case. The half hour or so of testimony presented here is a mild reflection, a miniature reflection of the eight-day trial that it took to present the Bank case during which, if the

Court please, counsel for the Bank spoke most eloquently, both through his pleadings and through his interpretation of the evidence, against any liability. I should say that he was quite right in the position that he there took because, if the Court please, the liability of the Bank to Mid-States has always seemed most ephemeral. Mr. McCallum seems to rely upon the theory that the authorization by a board of directors resolution not having been forthcoming to permit him to stamp the name of Mid-States on the checks, he committed an act of fraud and conspiracy against the Bank in presenting the checks. You will recall that a request had been made by him, by Lotz, of Mr. Hatfield for the authority and the response was this: Hatfield said, "I am not saying that we will not grant you authority, but I want to suggest that the simplest way to eliminate your problem would be for you to instruct whatever accounts you have that presently make their [1174] premium checks payable to Mid-States that, instead, such checks should be made payable to you. I am not saying we will not grant you the authority. I am proposing the means whereby you get the money into your account for us namely, by having the checks made payable to yourself."

The strength or the weakness of the Mid-States' case against the Bank is measured by this. He had the authority from his principal to collect the premiums, and the question was: How would he collect them? He was permitted to, and they suggested that he receive these premiums by checks payable

to his own name, and they merely withheld from him the authority to stamp their name on checks payable to them. In other words, if the bank had been held after an adjudication in that case, it would have been because the checks and the money came in to him by one means rather than by another, where the end result was not only authorized by the first principal but it was one of his chief duties to make that very collection.

Now, the judgment was stipulated to. In other words, Mr. McCallum is here in the position of having admitted an obligation to the Mid-States Company, which he protested most eloquently was non-existent throughout the course of the trial, and then on the basis of that non-adjudicated admission, saying he has thereby an action against us for that amount. The fact that the matter was not adjudicated, the fact that the payment was voluntarily made vitiates this case. His case against us [1175] is also vitiated, I suggest, by the fact that the act of Mr. Lotz, or his employe, Smead, in presenting the checks under those circumstances is not connected with the conspiracy in this case. Mr. McCallum seems to argue that because it was a part of the alleged conspiracy, namely, an act done in the carrying out thereof, then all the parties become liable for any consequences that might flow, even assuming for the moment that those consequences had been an adjudicated judgment. That does not follow.

There is no sign of a fraudulent intent on the part of Lotz under this letter in presenting those

checks. There is no liability or sign of fraud, and in particular no sign of any conspiracy, whether in New York or in Oakland, connecting this act with the objects sought to be obtained. It would be as if Mr. Lotz in carrying out the alleged conspiracy, in driving to Sacramento one day, struck a pedestrian with his automobile. The injury would have resulted from an act done pursuant to a plan but not by virtue of the plan. The casual connection would be entirely lacking. We will go further than this in the briefs, but I wish merely to point out what I think are two basic points which vitiate the case of the bank against us.

Now, when we come to the case of *Mid-States*, I wish to touch three or four points primarily, as my partner has indicated, from a legal standpoint.

At the outset of Mr. Garrison's argument I was extremely surprised to find him saying, at the close, that they are not relying here upon these funds being trust funds. They are not relying upon this man being a trustee as to those funds. They are not seeking to trace trust funds.

"Let him be a mere debtor," Mr. Garrison says. "Our case does not depend upon trust, the trust character of the funds." I cannot at this moment, if the Court please, measure the extent of this admission. I dare not accept it without reservation because I fear if I do, that when we come to the briefs, we will find that there is some very major reservation included in it because otherwise I cannot conceive of any basis for liability of the defendants in this case. Therefore I am going to

briefly sketch what I conceive to be the point involved, even though it apparently will be at odds with an admission here made.

The case, if the Court please, is based upon trust. The complaint alleges not only that this man, Lotz, was a trustee for Mid-States but that he held the premium funds that he collected on their business as trust funds, as fiduciary funds. Then it alleges the diversion of some \$151,000.00 of those trust funds by virtue of the conspiracy from Mid-States to American Fidelity. So that if Mr. Garrison's concession at the end is to be taken without reservation, then the entire case, if the Court please, has been tried on a theory totally [1177] foreign to the theory on which he now seeks to make the recovery. So I am going to take it on the basis of the pleading and on the basis of the theory upon which the case was tried and examine those for just a moment.

Trust, I venture to say, is the grossest misnomer as applied to those funds. Your Honor will recall there was a trust fund and an operating account. The monies collected as premiums went into the trust fund, almost always with the sub-agent's commission withdrawn prior. If not, then checks were drawn on the trust account to the sub-agent. The funds went out of the trust fund to companies, of which there were seven or eight, including the litigants here; funds went out to the operating account, they went from the operating account to pay the cost of the business, the clerks' salaries, the rent, and Mr. Lotz' own living expenses, his own with-

drawals. Monies went into the trust account by credits for commissions, money went into the operating account by commissions, by loans, borrowings by Lotz, money went from the operating account back to the trustee account, and so forth. We had open ends on both of those two accounts. As a matter of fact, if the trust account were a trust account, so was the operating account, because funds withdrawn from the trust account to another account in the hands of the trustee would naturally retain their trust character. So we disregard the two accounts and we say you have here funds in a trustee which the principal permitted [1178] him to use for sub-agents' commissions, for his own operating expenses, for his own personal use, irrespective of the character of them. You had permission to float, you had perpetual, almost perpetual delinquency, and letters and wires saying, "Pay me the money that you owe me." You had an obligation on the part of Lotz to pay the money. You know you do not collect it, something entirely inconsistent with trust.

And I just say to Your Honor let us imagine a bank which purports to be a trustee for a client. The client appoints the bank as a trustee to collect money for a building the client owns. The client says, "Transfer the collections to me gross. I will pay you a fee, but you have to pay me the rents gross." And suppose on the other hand that the man uses the funds to pay his salaries, to pay a man to go and collect the rents, to pay legal fees, to pay every variety of his own obligations out of

that with the knowledge of the client, and then add to this, if the Court please, further principals. Let us come back to this. We can carry the bank analogy in our minds if we wish or not. But let us come back to this: This man was a trustee for Mid-States. He was a trustee for American Fidelity, and six or eight other companies. He collected money for one, withdrawing part of it for commissions and operating expenses, and then for another and for another, and for another, and then money goes back out of that to companies, not, of course, in the ratio in which he collected it. I dare say there [1179] was not a single payment of it made by Lotz to an insurance company in this case which was identical with the amount then due it. No possibility of tracing at any given time this money which was in the account because of the commission. That I say is a portrait, not of a trust fund, but that is a portrait of a fund, the events concerning which merely measure the debt which is owing by the so-called trustee to the so-called principal on a given date.

If the Court please, these being debtor-creditor questions, what is the nature of the fund? How can it be maintained by a principal that the fund is sacred and can be traced if this indiscriminate use can be permitted? Suppose, for example, that the client of the bank permitted the bank to pay its own debt. Could it ever follow that money in the hand of the creditor of the bank? Obviously not, but the reason why it cannot, if it please the Court, is the fund has lost its trust character and merely

measures the debt on the so-called trustee to the principal. Money is trust or it measures debt. If it is trust it is sacred. The very first invasion by the subtraction of a sub-agent of his commission was an invasion of that fund. The first use thereof by Lotz to pay his operating expense was an invasion, and if there was any tracing to be done, the true tracing would be to trace to all those outlets.

If the Court please, Mr. Garrison at the conclusion of his argument says he is not going to trace. He does not have to [1180] trace, as a matter of fact, to maintain his position. That, too, mystifies me. I never saw a more labored effort to trace the Public Service money in my life. Check after check has been placed in here. The money came in here one day, small bank balances, a check made the next day to American Fidelity, and then down the line of that ledger, we have been carried time after time. If we do not have to trace here, why was the time of the Court consumed with this most elaborate tracing in the Public Service case? If we do have to trace it is because these are trust funds and, if the Court please, they are not trust funds. As a matter of fact, the Public Service so-called tracing is a selective tracing, if the Court please, taken out of the period of time of some eight or nine months in which this agent represented both of these principals. Why take the Public Service transaction and trace it? There's only one way to trace it, if the Court please, and that is to go back from the beginning, every dollar that went in, every dollar that went out, while it represented both companies, stop

the books on each invasion, and say, "Whose money was it that he took?" And every time a credit went to the account or commission went in, "Whose money was replaced and in what proportion?" Provided we can agree on a principal. But that is the only possible way to trace it. Trace it all or do not trace it at all.

The Public Service money is a selective tracing that is not valid. The Public Service money doubtless, if the Court [1181] please, if this hugely expense procedure were entertained, would be found to compensate for many a premium of American Fidelity that went to Mid-States in the era in which American Fidelity's premiums first began to flow into that account. So we say, if the Court please, Mr. Garrison's case alleges, was tried upon the theory of trust. Mr. Garrison's right of recovery depends upon trust in spite of the admission he make and we say there was no trust. These were debtor monies and therefore they did not have the sacred character which has been represented here to the Court.

Next plaintiff says, however, that Lotz was insolvent.

"You got paid, we did not. We suffered a loss, and now we sue you for the loss."

An insolvent, as Your Honor knows, may pay one creditor in preference to another. Business could not be conducted if that were not so. If that were not so, every time a creditor received the payment of his money he would have to put a contingent liability on his books in the absence of mak-

ing an inquest into the financial affairs of the debtor. Your Honor knows what the remedy is. If a man is insolvent and he pays one creditor compared with another, the remedy is to cause the creditor who has been paid to put back the money has has been paid if it has been paid within four months of a petition in bankruptcy.

The remedy in this case of the plaintiff, having discovered the loss in November, 1951, was to go back—they had ample time—and put this man in bankruptcy or assert the bankruptcy remedy and then an involuntary bankruptcy would have had to ensue. But instead of that, the plaintiff, if the Court please, took a tremendous gamble. The plaintiff said, "We will run it out. We will not assert the preference within the four months. We will liquidate the business and then we will hand the other creditor the bill." If the Court please, no such procedure is countenanced in the law. No such action lies.

I was going to comment on the proximate cause of the insolvency. My partner has covered it, and in view of the shortness of time I am going to pass them. My point in brief is these people knew that two things created an insolvency in Joe Lotz, the increase in the loss ratio and stoppage. No matter how high his loss ratio increases, if you do not stop him, he goes on, but the check kiter comes to justice when you stop him. These people knew he was using this money. They knew his loss ratio. They knew of it because of the sub-agents' commission and the operating expenses totalling some forty-

two per cent, he was suffering a twenty-seven per cent deficiency, \$27,000.00 out of every \$100,000.00. The proximate cause of his insolvency was known to him. They would not come out and say that they were even in doubt as to that.

Finally, I wish to mention the damages here. I have [1183] partly touched it here. Plaintiff seeks its entire net loss upon the completion of liquidation. Even if it were entitled to damages, if the Court please, they would certainly not have been that because the alleged fraud, even if it existed, was not the cause of that entire bill. There were two bases of the loss, if the Court please. There could not have been any other basis because there was no embezzlement here for the usual illicit personal purposes. Here the causes of the loss were the invasion of the premiums for sub-agents commissions and operating expenses and any money of the Mid-States net which may have come to American Fidelity which got paid. As to the former, the invasion for the commissions and expenses, the fraud could not possibly have been the cause of that loss because they well knew he was invading his funds for those two purposes. The other was the only possible thing that could have been attributed to any wrong purposes if they existed. In our briefs we will set out what we think is the limit of that by virtue of the concessions made, that is, by virtue of facts found in the exhibit prepared by Lester, Herrick & Herrick, the accountants for Mid-States, and we say that on the basis of figures presented there, the total possible net profits that could have come from

Mid-States to American Fidelity could not have exceeded \$65,000.00. The exigency of time prevents me from giving Your Honor the detail of that, but we will in our brief. [1184]

As to the special damages, they ask for the cost of liquidation. Under no circumstances could the cost of the liquidation be attributed to any wrong doing on the part of these defendants. These men, by virtue of their own balance sheet, I mean the balance sheet of Mid-States' accountants, were insolvent some \$79,000.00 or \$80,000.00 on July 31st, 1951. We were paid and we move on. They go on with their business. They are the principal to whom he refers at the end of the trail. The principal whom they represent at the end of the trail will naturally have the cost of the liquidation. If we are not liable as a creditor who has paid—and we are not, Your Honor, because there was no bankruptcy here—then we were not liable for the liquidation which was for the account of the principal at the end of the trail. And so, if the Court please, we say that this is a case tried not only on the ground that the agent was a fiduciary to the principal, an agent for underwriting and general purposes, but it was tried on the ground that the premium funds that were collected for the plaintiff in this case were sacred trust funds.

I refer Your Honor to the pleadings. The case on the entire evidence was tried upon the same theory. These were trust funds. The admission of Mr. Garrison was fatal to his case. That will have to be borne out in the briefs as they come. I cannot con-

ceive of how he can make the admission and save any part of his case. [1185]

In the second place, we say that one creditor getting paid when another does not, in the case of an insolvent, the remedy is bankruptcy and setting aside all payments made within four months.

Thirdly, we say that the Mid-States Insurance Company was well aware of the factors that were sending this man into bankruptcy: High loss ratio, high writings and estopping.

Finally, we say that to hand us the bill would make the exact opposite of what plaintiff says should happen. Plaintiff says that one man should not bear this bill of bankruptcy. If Your Honor should give a judgment to the plaintiff in the amount they seek, that would be the result. In the case of an insolvent, the entire loss, not a part thereof, as would have been adjudicated in bankruptcy, but the entire loss would then have been borne by the defendants, and the plaintiffs toward whom he was insolvent and to whom he owed this large amount of money would receive a complete replenishment of their entire funds, and no lawsuit whatsoever. No such function applies.

Mr. Tiedeman: Just a short statement on behalf of the defendant whom I represent. First, everyone who has testified as to Joe's character, there is no doubt of his honesty and integrity. Joe Lotz may have been guilty of negligence and bad judgment in regard to the conduct of his insurance business, but even those would probably not have resulted in plaintiff's [1186] loss if the plaintiff had coop-

erated with Joe under the agreement, that is the agreement in connection with Joe's assignments.

Now, the plaintiff alleges a conspiracy to defraud. It takes two or more parties to enter into a conspiracy, and I believe that considering all the testimony on this point, it is not reasonable that Joe is guilty of having conspired to defraud, because there was no motive or intent on his part. All he wanted to do was to pay the person who was pressing him the most for the money, and he did not achieve any benefit from paying one company. Prior to and up to the time when these unfortunate events took place, both Mid-States and the American Fidel were, as Mr. Bronson says, policy hungry. Both companies were urging Joe to write more business, and Joe, who was perhaps unmindful of the consequences, plunged right ahead, not realizing until too late that he was headed straight for disaster. Then when American Fidel pressed Joe for money, Joe's primary thought was to get this creditor off his neck. The solution, that is, the Public Service deal, seemed perfectly logical to him. He, perhaps unreasonably, thought that his reserves with both companies would take care of any possible deficit, and Joe actually believed, whether or not he was right, that he did hold large reserves in these companies through premiums and writings that on this retrospective plan would come into actuality in time. Now, his one motive and intent was [1187] to pay the party who was pressing him the most, and it is just as the old saying goes, the squeaky wheel gets the grease.

Joe was the general agent of both companies, and as such he had authority to endorse checks payable to his principals, both the American Fidel and Mid-States. Some of plaintiff's exhibits are letters between Joe and Hatfield. Mr. Hatfield urges Joe to have his sub-agents make checks payable directly to Joe to overcome any trouble Joe might have with the bank on this score. Your Honor will recall that Joe testified that one such sub-agent up in Chico, Jackson Motor Sales, consistently sent Joe checks payable to Mid-States alone, although such checks concerned policies of various insurance companies. He wrote for more than Mid-States or American Fidel. In such circumstances, if Joe were to operate under strict trust principles, he probably could not have operated at all. Your Honor has learned of the operation of Joe's trustee account and his operations account. You have heard how Joe would transfer funds from one account to the other, back and forth as required. You have heard Mr. Hatfield testify that as a general custom of the trade it is impossible for an agent representing several companies to maintain a trust fund for each company, and the one reasonable conclusion is that as to his accounts with these companies, this relationship was that of a debtor-creditor and not a trustee.

Now, the American Fidel and Mid-States were general [1188] creditors, and it would appear not to be wrongful for a debtor to pay one general creditor in preference to another general creditor. Joe knows that he owes Mid-States a lot of money

today. He admits this. He owes them hundreds of thousands of dollars. And Mid-States knows that it does not stand a chance of collecting from Joe alone because Joe, as we know is broke. He is flat broke. Mid-States put Joe out of business after the assignments and thereby ruined any chance they might have had to collect.

Then what is there left? Just the plan to set out a conspiracy to defraud between Joe and American Fidel because this is the only way the plaintiff has of recovering, and when Joe had assigned his business and the fund which was held to his credit by American Fidel over to Mid-States, you might wonder why he would do such a thing. He is just a little fellow, an ex-baseball player, trying to make a go of business, and he worked hard to get his business. He wasn't going to give it up just because someone asked for it.

The testimony of his attorney, Bill Mead, shows that Mid-States expressed the promise to help Joe keep his business going and not to start a lawsuit. When Mid-States first asked for the assignments, Joe refused and he would never have made those assignments except for the plaintiff's express promises. Such conduct on the part of the plaintiff was, well, it was just a sneaky and entirely reprehensible. [1189]

Shortly thereafter the plaintiff confiscated Joe's office, his records, put him out of business, had proceedings instituted by the Insurance Commissioner, and Joe's insurance license was suspended, that is, excepting for the restricted right feature

thereof. And what becomes of Joe? Now he is peddling mortgage insurance from door to door, just struggling to eke out a meager existence. We feel that Joe has been greatly damaged by the fact that Mid-States breached its promise to Joe, and I mean the promises given in consideration for the assignments, and we ask that you find that in such breach the plaintiff in fact repudiated these assignments and that they are of no effect now, and I am referring especially to one assignment in which Joe signed over certain funds he holds with the American Fidelity through earned commissions on premiums.

As to the case of the Anglo Bank against Joe, I think Mr. McKinnon has stated our case pretty thoroughly and as our cases coincide, I will adopt his argument as to that. Thank you.

Mr. Garrison: I would like an opportunity to answer some of the arguments of Mr. Bronson and Mr. McKinnon, but I cannot quite do it in five minutes. I do not want to impose on Your Honor's time. I could probably do it in fifteen minutes. I will follow whatever suggestion Your Honor has.

The Court: I will cooperate in whatever you wish to do.

Mr. Garrison: If Your Honor would let me impose on the time [1190] of the Court until ten or fifteen minutes after four, I will try to finish and we won't have to come back tomorrow. If somebody else also wishes to argue, we may have to come back tomorrow anyway.

Mr. McCallum: I will pass my opportunity and try to finish up today.

The Court: Is that agreeable to all?

Mr. Bronson: Yes.

Mr. Garrison: If I may work backwards, I will talk about Mr. McKinnon's comments first. The complaint alleges the facts as we found them. It sounds in fraud and it is based on a conspiracy of the defendants to defraud the plaintiff. We allege that the defendant, Lotz, was an insurance agent and that he received premiums and that those premiums are characterized in the law as trust funds, that he was the trustee of the plaintiff who held them in trust. We still maintain that that is true, and that the evidence so establishes, but we say, if Your Honor please, that that is not essential to recovery. We say that whether they were trust funds or not, the defendant Lotz, was our agent. He had a fiduciary duty to us. He broke that duty and therefore is liable.

Under Mr. McKinnon's theory, if we had such an agent, and if he had trust funds, and if he violated the law with respect to commingling or some other conduct with respect to those trust funds, and we sued him, they would have a perfect defense [1191] because they would say, well, the money lost its character as trust funds and therefore we are not liable to you because it was a debtor-creditor relationship. But they overlook the fundamental proposition that an agent, quite aside from the nature of his money, has an obligation simply by reason of the agency relationship. So we do not

want to involve ourselves in a lot of discussion here about trust funds when we do not think it is essential to recovery. Certainly we went into the conduct of the parties in handling of money from Public Service because that shows how the fraud was committed and it shows their action in respect to having money that belonged to the plaintiff, Mid-States. We did not do it for any purpose of tracing funds. We have not attempted to trace funds. We tried to bring to this Court and to Your Honor every bit of evidence we could find. We attempted to show how this fraud was committed. We have attempted to show as nearly as we could what happened to the money, but to that extent we did discuss the Public Service money and we showed that they got it. But that was not essential to our recovery. It was simply explanatory of the conduct of the parties.

Mr. McCallum is more interested in that particular transaction because that involves his cause of action and for that reason he was anxious to show those particular steps in the deposit of the money and the immediate withdrawal by the American Fidelity. But we do not propose to trace funds and [1192] never have. We say Lotz was our agent and that under the law his funds, premium funds, were trust funds. But if they lose that character because of some acts on his part, his duty as an agent remains just the same. Mr. McKinnon contends that they may be liable for some of our loss but not for all of it. I think he has overlooked the very fundamental proposition that where someone participates

with another in a wrongful act, and that the victim or innocent party suffers a loss, the Court does not attempt to pick out exactly what portions of that loss that may have been directly related to the wrongful act. The law says the innocent party is entitled to recover for all of his damages that properly flow from that wrong. So that if we have suffered a loss here, an out-of-pocket loss, which everyone concedes that we have, and it came about as the result of a wrongful act by Mr. Hart pushing Mr. Lotz and Mr. Mead around and taking our money, then we are entitled to recover for all the loss that proximately results from that wrong, and you are not going to say, "Well, we will give you this and we won't give you that because maybe this is more directly connected than the other."

If the Court please, the fundamental thing that we tried to argue in our objection to this evidence in connection with 1947, 1948, 1949 and 1950, and which counsel seems not to follow, is the fact that at the time in August when this meeting occurred in New York, Mr. Lotz' account with Mid-States Insurance [1193] Company was absolutely current and paid up. He did not owe Mid-States a dime. He did not owe them a penny until September, when they made the \$29,000.00 payment. Insofar as this fraud is concerned, insofar as what occurred between January 1st, 1951 and the end of that year, it does not make one bit of difference what the conditions might have been previously, one year, two years, three years before, the fact is that at the moment the American Fidelity came into Lotz'

office, Lotz was paid up with the Mid-States Insurance Company. His account was current, and had he been left alone there would not have been a loss. He was not headed for any disaster at that point. He was paying his bills and he had sufficient capital to function. But as of that moment, the American Fidelity started to write a larger volume than he had ever written before, and by August he owed them \$250,000.00. I submit, if the Court please, it does not make any difference what Mr. Donnelly might have told him four years before, or Mr. Cass two years or three years before. The fact of the matter is he was operating under this contract of 1951, his account with us was current, he owed us \$29,000.00, which was not yet due, and I say that this case must be decided on the basis of what happened in 1951 and not in 1949.

Now, Mr. Bronson apparently attempted to defend this case in his argument upon Mr. Smead. We have no case for Mr. Smead one way or the other. He was an employe of Mr. Lotz. [1194] We found this situation and there he was. We took his statements and we brought him into Court and we presented him and every bit of evidence we could find. The peculiar part about Mr. Smead is, the peculiar and unfortunate thing for Mr. Bronson is that so far as that statement is concerned, everything he says in there happened. The facts as they developed are consistent with what that statement says. The only things in that statement that are in conflict are the conversations, and Mr. Hart denies those conversations, but they struck me as ringing

fairly consistent with the plan as it actually developed. Mr. Smead, call him what you may, is a boy in comparison with Mr. Hart. He is a child in comparison with Mr. Hart. Mr. Lotz is a retarded adult in comparison with Mr. Hart. There isn't any question in the world that Mr. Smead told an untruth when he testified before the Insurance Commissioner and he repudiated these statements.

But let me ask one thing: Who was he employed by at that time? Who was his lawyer and who was paying his lawyer at that time? Not the Mid-States insurance company but Mr. Hart. He talks about our being in peace with Mr. Smead. We did not employ him; Mr. Hart did, and he worked for Mr. Hart for over a year. He worked for him, in fact, until they got his testimony under oath and then he did not work for them any more. So the marriage is not between us and Mr. Smead; it was between Mr. Smead and Mr. Hart. So I do not think it comes very well from [1195] Mr. Bronson to try to relate us to Mr. Smead when the facts are to the contrary. It to me was a very peculiar thing when Mr. Smead said not only had he had this pressure from Hart to collect this money but it had continued on right up until the time he went to work for him and had to get away from those statements that he made and he told Mr. Smead, Hart did, that he had to forget those statements. And isn't it a peculiar thing when Mr. Smead was going to Mr. Bronson and Mr. McKinnon's office to repudiate these statements and he told Hart about it, and Hart said, "You can't tell them the

facts because if you do, they won't represent me"—that is exactly what he said, and that is what I believe he said because they knew, Mr. McKinnon and Mr. Bronson, as I do, and Hart knew that they would not represent him if Smead told them the truth.

Mr. Bronson: That is Smead's testimony, not Hart's testimony.

Mr. Garrison: That is right. That is Smead's testimony, but Mr. Hart knew those gentlemen would not have represented him if Smead had told the truth.

But we are not dependent upon Mr. Smead's testimony in this case. Mr. Bronson makes quite a point of the fact that we are trying this case upon Mr. Smead's evidence. That is not the case at all. We are trying it on the facts as they developed, and you can prove this case without a single witness if you take the auditor's statement and if you take the correspondence [1196] that went between those parties, because the fact is that Mr. Hart got our money, and I do not care whether you talk about the New York meeting or you discuss the conversations in New York or the conversations in Oakland. They got our money and that is all there was to it, and if you did not have a single witness, that one fact alone convicts Mr. Hart. And the thing I said earlier and the thing Mr. Bronson glossed over very casually is the fact that when all of these things were done commencing on August 22nd, Mr. Hart and a smart lawyer from New York had made the fatal mistake of designating Mr. Smead as their

agent, and when the Public Service deal was made, and when they got these other premium collections, and when they made the American Fidelity and Casualty rewrite, Mr. Smead was their agent and they are chargeable legally with every bit of knowledge of everything that he did.

As a matter of fact, the very appointment of Mr. Smead by Mr. Hart was a breach of Lotz' fiduciary duty to the Mid-States Insurance Company because what did he do? He came in there and took an employe of Lotz and made him his agent and removed Lotz' authority from the financial aspect and made Mr. Smead their agent, in conflict with the interest of the Mid-States Insurance Company. So that thereafter whenever Mr. Smead talked to the Mid-States people he was talking to them as the agent of American Fidelity and Casualty and not as the employe of Mr. Lotz, and that in and of itself is a breach [1197] of the obligation of first Lotz to Mid-States, but participated in by Mr. Hart's actions, and that is why I say that if Lotz is liable because of a breach of his fiduciary duty, and if those breaches, innumerable as they are, were participated in by Hart, then the law is very, very clear that that person likewise shares the responsibility.

Just picture Mr. Hart on the one hand, this aggressive, hard-driving, successful man and this boy, Smead, and Mr. Lotz. Imagine those people sitting down and attempting to work out a problem. You can well understand why the thing went the way it did. They were weak. They yielded to this pres-

sure, and they got themselves into a tragic misfortune. There is no question about that. But the motivating, driving influence was Mr. Hart and his desire to get his money.

Mr. Bronson alludes to the fact that Mr. Lotz in his operation was such an almost tragic affair that it was just pathetic. He was living on everything—borrowed money, his writings were substandard, and it was almost a crime for him to continue to operate. Well, that would be all well and good except for one rather significant thing and it happens to be in writing, and it happens not to be subject to Mr. Hart's denial, and that is the letter that Mr. Sudekum, an officer of the American Plan, wrote to Mr. Markel, the Vice President of the American Fidelity and Casualty Company. This, Your Honor, is dated in April, 1951, two months before the August meeting. [1198] This is three months after the American Fidelity started writing in the Lotz office. Mr. Sudekum wrote to Mr. Markel:

“Dear Stanley: The above account” (referring to Joe Lotz) “is an extremely active account in the State of California, giving us a considerable amount of premium income. The account has been with Mid-States for a great many years and has established an enviable record. During his visit to California recently Mark Hart was requested to grant the account a seventy-five day premium payment addendum. We can only highly recommend you to grant this request, and we would appreciate your early permission to issue the necessary addendum.”

That is the same agency that Mr. Bronson de-

scribes as being so shabby and operating on borrowed money and writing substandard business and so on. But it was a good enough account for Mr. Hart to come in there and give him a seventy-five day credit period when Mid-States had been giving him only a twenty-five day credit period. The vice, if any, from credit periods, resulted from the first extension that Mr. Hart gave them.

If the Court please, the case here seems to be one where, according to Mr. Bronson we are dealing in a hard school where the toughest survive and the Lord help the weak. He says this is an arm's length business. This is the hard school of [1199] business and they do not have to disclose anything to anybody, and so on. Well, he has overlooked some very significant pronouncements of the United States Supreme Court, our Courts of Appeal, our District Courts and our State Courts. The insurance business is not in the same category as an auction house or a secondhand store or the marketplace as such.

The insurance business is affected with the public interest and the Court's have said the public has an interest in the conduct of that business, and for that reason they have established a very carefully prepared set of rules by which the insurance business shall be conducted, and they have imposed upon the agents in the insurance business a higher degree of duty than is imposed upon others. They have characterized their funds as trust funds. They license people to carry on the insurance business, and they have tried to remove insurance from this school of hard knocks where you can get what you can against

the other fellow, and the crime is not in doing wrong but in getting caught. So I think Mr. Bronson has misquoted and done a disservice to the insurance business because it is not conducted on that basis. It is conducted for the most part by gentlemen whose word is good, and he was not out trying to cheat someone else.

He also lays great stress on the fact that the Mid-States Insurance Company were asleep, or I think he used the term "were more somnolent" at one time. He also said in his argument [1200] they did not know what they were doing. The Mid-States Insurance Company had no reason during 1950 and 1951 to make any inquiry regarding Mr. Lotz because their accounts were current and paid up. Until they had some knowledge that could have put them to the duty of investigating, they had a perfect right to assume that he was going to obey the law and that he was going to obey his contract, and they had no duty to make any inquiry into Mr. Lotz or to anticipate Mr. Hart was going to come in there and do this thing which was done, and they had a perfect right to accept Mr. Lotz at full face value.

Justice Traynor, in *Seger vs. Odell*, used this language and I think it fits here very perfectly. It says:

"No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool."

18 Cal 2nd, 409. In the same case it says, "Negli-

gence is no defence to an intentional tort," and it cites Frazer on Torts, California Jurisprudence. In the Heckler vs. Donnelly case, the Court said, "The law does not applaud fraud and condemn the victim for his credulity." If we are in a situation where one fellow, by being fortunate in having the first check bounce, and an insolvency that results from his actions, his writings, his increased volume, who gets in there first, and in less than a month has taken out of that agency \$140,000.00 by being more aggressive—if that is the test by which the insurance [1201] business is conducted, then the Insurance Code had better be re-written. I do not think Mr. Hart would like to have the Insurance Commissioner of this State know that their business conduct is based upon the proposition that if you get there first, you get your hands on the money; if not, though it is somebody else's, that you can't ever be required to return it. That is not the insurance business as I believe it is being administered in this State, and I do not think Mr. Hart would subscribe to that one minute because if he did, his company would be out of this State immediately. That is not the insurance business, if the Court please, and quite aside from the higher duty imposed upon the insurance company, if you put it to the level of the commonest agent—and I happen to have read a case in this court involving the duty of an agent to his principal—and you strip it of its fiduciary aspects, don't think about the question of trust funds at all, but simply show that this man is my agent, that man owes me fair dealing, disclosure,

honest treatment, and if anybody comes along and induces him to defraud me, they are both liable.

They talk about this business of paying the first creditor first, and there is no problem if you have a debtor-creditor relation, if you pay the first creditor in preference to another creditor. That is not what we have here. In this case Mr. Hart by his actions created the very indebtedness in the Mid-States Insurance Company out of which he got his account paid. The [1202] money was not there, and he simply got paid himself and let Mid-States wait. He created, through the Public Service trick, through taking the Public Service business and putting the liability on the Mid-States Insurance Company he created the very liability out of which the money came that he himself used to pay his account. That is a conspiracy to defraud. It is not paying one creditor in preference to another. It is the creation of a liability on one principal and taking the product of that liability and paying the account of another and that, if the Court please, is pure, unadulterated fraud.

One thing more and I will close. We do not, by the fact that I have not tried to argue, waive our allegation of punitive damages. The cases hold that where a plaintiff suffers as a result of a plan and a scheme to defraud, that the Court in its wisdom can award punitive damages if it finds that there was such a plan and scheme. We think there was here. We believe, even if we were paid our out-of-pocket loss, it would not be adequate, and we believe in this case that Mr. Hart should be penalized

over and about our actual loss by a finding of this Court of punitive damages. I am sorry I took so long.

The Court: What is the next order of business, gentlemen?

Mr. Garrison: We submit the case, if the Court please.

Mr. Bronson: Our case is submitted, American Plan and American Fidelity.

Mr. McCallum: Submitted. [1203]

Mr. Tiedeman: Submitted.

The Court: It is submitted all around. You have been talking about briefs here; what about the briefs?

Mr. McKinnon: I believe the case should be briefed, if the Court please. I do not think it is fair to the Court to present such complex issues without having a record of them on a brief of thirty or forty pages where Your Honor can review them. I think it would be an inadequate presentation without such a brief. For example, we have responses to make to Mr. Garrison's points. It is hard for me to contain them. We can't go on here forever. We can put them on a piece of paper.

Mr. Garrison: Nobody is arguing that. I am perfectly agreeable. If the Court wishes briefs, we will present briefs.

The Court: What is your thought?

Mr. Garrison: I will make a self-serving statement. I think the case is so clear it can be decided without briefs.

The Court: I do not think so.

Mr. Garrison: I think it is a long trial and it is a complicated case and we will be very happy to submit briefs. We will do it on any basis that the Court indicates.

The Court: I will adhere to whatever wishes you gentlemen indicate.

Mr. McKinnon: May I suggest thirty, thirty and fifteen after the transcript is prepared, something of that kind. Is [1204] that all right?

Mr. Garrison: That is a long time in the future. We have ordered a transcript.

The Court: Let me inquire.

(Conversation with reporter.)

The Court: It needs further perusal. I might say to all of you I have not made up my mind. I sympathize with the jury you gentlemen might have had. I am rather frank about these matters. There is some comment I might make now. It might be helpful. But I will put you gentlemen to work to make the most of your own cases. I should like, if possible, after the transcript has been prepared, to make it ten, ten and five.

Mr. McKinnon: Surely. We will have ours in in ten days.

Mr. Garrison: We will, too.

The Clerk: July 23rd for submission.

Mr. Garrison: I am assuming the first ten days will begin at the completion of the transcript, so that the first brief will have the advantage of the transcript.

The Court: I have made a pronouncement at the

outset of this case that might be interesting to you gentlemen. Somebody is going to be disappointed.

Mr. McKinnon: How does that ten, ten and five affect the intermediate gentleman?

The Court: I think they are agreeable to that.

Mr. McCallum: I assume we have the same ten days Mr. Garrison has. We file ours on the tenth day.

Mr. McKinnon: I just wanted to be sure we were clear on that.

The Court: That will go over to July 23rd.

Mr. Garrison: May it be stipulated that the party whose time is running out on the memorandum may have access to the exhibits and take them out so that both sides may have them?

The Court: I cannot refrain from making this comment, and I do not often engage in comments of this kind before I conclude, but this has been a real treat to me as a trial judge. Everybody came in here well prepared, and that is the reason I gave you full opportunity to present your cases and I want you to know I appreciate it, gentlemen.

Mr. Garrison: Thank you very much.

Mr. Bronson: I thank you.

Mr. Garrison: It has been very pleasant. Mr. Bronson and I have mentioned a number of times that we have enjoyed working on the case together, and everyone has had a feeling of camaraderie here.

Mr. Bronson: We do not know how long that feeling will last!

[Endorsed]: Filed Nov. 24, 1954.

[Endorsed]: No. 14695. United States Court of Appeals for the Ninth Circuit. Mid-States Insurance Company, a corporation, and The Anglo California National Bank of San Francisco, Appellants, vs. American Fidelity and Casualty Company, Inc., a corporation, American Plan Corporation, a corporation, Mark Hart, Joseph Lotz, Ralph L. Smead and L. Sudekum, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 19, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,695

MID-STATES INSURANCE COMPANY, etc.,
et al., Appellants,

vs.

AMERICAN FIDELITY AND CASUALTY
COMPANY, INC., etc., et al., Appellees.

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO, etc., Appellant,
vs.

AMERICAN FIDELITY AND CASUALTY
COMPANY, etc., et al., Appellees.

APPELLANT MID-STATES INSURANCE CO.
DESIGNATION OF RECORD AND STATE-
MENT OF POINTS

Appellant Mid-States Insurance Company adopts as its Designation of Portions of Record to be Printed its Designation of Portions of Record, Proceedings and Evidence to be contained in Record on Appeal, heretofore filed in the above entitled actions, as consolidated, in the District Court of the United States, for the Northern District of California, Southern Division, with the following addition:

1. This Designation of Portions of Record to be Printed and Statement of Points on which Appellant Mid-States Insurance Company Will Rely.

This appellant also adopts as its Statement of Points on which Mid-States Insurance Company Will Rely that Statement of Points heretofore filed by this appellant in the above entitled actions, as consolidated, in said District Court.

Dated: March 24, 1955.

/s/ LEWIS SCHIMBERG,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Appellant Mid-States
Insurance Company .

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 25, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

AMENDMENT TO DESIGNATION OF RECORD

It Is Stipulated by and between the parties hereto that this Amendment may be included and the following items be excluded from those Designations of Portions of Record to be printed heretofore filed:

Items to be excluded:

1. Exhibits 1 and 2 to Complaint in Intervention of The Anglo California National Bank of San Francisco, in action numbered 31496;

2. Exhibits 1 and 2 to Third Party Complaint of The Anglo California National Bank of San Francisco, in action numbered 31311;

3. Exhibits A, B, and C of Answer of The Anglo California National Bank of San Francisco in action numbered 31311;

4. Plaintiff Mid-States Insurance Company's Exhibit 17 in actions numbered 31496 and 31311 as consolidated;

5. Answer of defendant Joseph Lotz in action numbered 31496 (already printed in appeal No. 13756 in the United States Court of Appeals for the Ninth Circuit; referral to be indicated in index.)

Dated: March 29, 1955.

/s/ LEWIS SCHIMBERG,

/s/ WALLACE, GARRISON, NORTON
& RAY,

/s/ JOHN R. PASCOE,

/s/ MAYNARD GARRISON,

Attorneys for Appellant, Mid-States
Insurance Company

/s/ SEVERSON, McCALLUM & DAVIS,

/s/ NATHAN BERKE,

Attorneys for The Anglo-California National Bank
of San Francisco,

/s/ HAROLD R. McKINNON,

/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Appellees American Fidelity and
Casualty Company, Inc., and The American
Plan Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 30, 1955. Paul P. O'Brien,
Clerk.





